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In The

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

DENNIS WALDON STOCKTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether *Smith v. Phillips*, 455 U.S. 209 (1982), requires a petitioner seeking federal habeas corpus relief to demonstrate that he was actually prejudiced by an alleged extraneous contact with his state trial jury; this being a question which has sharply divided the federal circuits.

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v.

DENNIS WALDON STOCKTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, the Commonwealth of Virginia and Edward W. Murray, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceedings on July 22, 1988.

OPINIONS BELOW

The opinion of the divided panel of the Court of Appeals for the Fourth Circuit is reported at 852 F.2d 740

(4th Cir. 1988), and is reprinted in the appendix. (App. 53a). The Memorandum Opinions of the United States District Court for the Western District of Virginia are unpublished, but are set forth in the appendix. (App. 2a, 34a.)

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 22, 1988. A petition for rehearing and suggestion for rehearing *en banc* was denied on September 27, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On July 25, 1978, the body of eighteen-year-old Kenneth Arnder was discovered in Surry County, North Carolina. At the time of discovery, both of Arnder's hands had been severed above the wrist, there was a gunshot wound to the head, and the body was swollen and discolored. Arnder was killed because he may have cheated a man named Tommy McBride on a drug deal. McBride sought to hire a killer to eliminate Arnder, and Dennis Waldon Stockton volunteered. Stockton was paid $1500 for his grisly efforts.

In the ensuing months and years, Stockton made a number of references to the killing, including a threat to cut off the hands of a cellmate, just as he had done to Arnder. On another occasion, Stockton shot and killed a

man named Ronnie Tate because Stockton believed Tate had been "running his mouth" about the Arnder murder.

Although some time passed before authorities were able to establish that the killing had occurred in Virginia and gather the information needed to prosecute Stockton, he was ultimately tried in the Circuit Court of Patrick County, Virginia, for the capital murder for hire of Kenneth Arnder. On March 23, 1983, following a three-day trial, the jury found Stockton guilty as charged. On the following day, pursuant to Virginia's bifurcated trial procedure for capital crimes, evidence was heard regarding sentence. The jury sentenced Stockton to death, finding that he was likely to commit criminal acts of violence which would constitute a continuing serious threat to society ("future dangerousness") and that his conduct in committing the offense at issue was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and aggravated battery to the victim ("vileness").

Following trial, Stockton's attorneys filed a motion to set aside the verdict. Among the grounds alleged in support of that motion was a claim that the jury had discussed the case during a luncheon recess. Accordingly, on June 7, 1983, an evidentiary hearing was conducted on the issue raised.

Evidence was presented on behalf of Stockton from two witnesses, Ginger and James Blackard. Their testimony indicated that on the final day of trial, the sentencing phase, they had eaten lunch at a local restaurant known as the Owl Diner. Also lunching at the Owl Diner were three or four male members of the jury. James

Blackard recalled that among the group of jurors was the foreman, Mr. Cockram. Both Blackards testified that Glen Puckett, the owner of the Diner, approached the jurors and asked if a verdict had been reached. One unidentified juror responded to the effect that everyone had decided except for one – "a damned woman". James Blackard also recalled that Glen Puckett had said " . . . something to the effect, . . . I hope they fry that son-of-a-bitch." Upon cross-examination however, Mr. Blackard admitted that the only conversation he heard was the inquiry concerning whether a verdict had been reached. He also admitted that he had been subpoenaed to testify at the trial on behalf of Stockton and that he had previously been convicted of four felonies and two misdemeanors. Stockton called no other witnesses.

In response to the Blackards' testimony, the Commonwealth presented evidence from Gary Cockram, foreman of the jury which had tried Stockton. Cockram testified that, although he was not acquainted with the owner of the Owl Diner personally, he did recall Puckett stopping by the booth where he was having lunch. However, Cockram "did not feel like I was talking to him because I don't have a personal contact or knowledge with the man." Cockram specifically denied discussing particulars of the case with other jurors or hearing any other member of the jury say something about "a damned woman." The only statements or questions Cockram recalled from anyone, including Puckett, were general questions about whether a verdict had been reached. Cockram further stated that any comments he had heard from persons other than members of the jury had no influence upon his verdict.

Following conviction, Stockton was accorded an automatic appeal to the Supreme Court of Virginia. After full briefing and oral argument, the conviction was affirmed by published opinion. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984). Application to this Court for a writ of certiorari was denied on October 1, 1984. *Stockton v. Virginia*, 469 U.S. 873 (1984).

The initial habeas corpus proceeding was held in the Circuit Court of Patrick County. Following oral argument, that petition was dismissed by order dated July 17, 1985. Stockton noted an appeal of the habeas corpus dismissal to the Supreme Court of Virginia; however, the appeal was never perfected and by order of that Court dated April 9, 1986, the record in the case was returned to the circuit court.

In the meantime, Stockton simultaneously filed identical petitions for a writ of habeas corpus in the Circuit Court of Patrick County and in the Supreme Court of Virginia pursuant to its original jurisdiction. The circuit court petition was dismissed by order of the court dated June 20, 1986, and the Supreme Court of Virginia petition was dismissed by order of that Court dated July 1, 1986.

Thereafter, Stockton filed a petition for habeas corpus relief, which was later amended, in the United States District Court for the Western District of Virginia. On January 27, 1987, the district court entered an order dismissing most of Stockton's allegations and setting a plenary hearing on the following issues:

> A. whether [Stockton] was denied a fair trial by an impartial jury due to outside influence on the jury during the deliberations at the sentencing phase of trial; and

B. whether improper deliberations among members of the jury took place.

A plenary hearing was held on April 20, 1987, limited to the two issues delineated by the Court. Evidence was presented through live witnesses and by deposition. On June 18, 1987, Judge Jackson L. Kiser entered an order granting the writ of habeas corpus "to the extent that the sentence shall be and hereby is vacated and Petitioner shall be given a new sentencing hearing or his sentence shall be reduced to life imprisonment." (App. 33a). Applying the "presumptive prejudice" test described in *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532 (4th Cir. 1987), the district court concluded that there remained a reasonable possibility that comments made by the owner of the Owl Diner during the luncheon recess on the final day of trial may have prejudicially affected the jury's decision regarding Stockton's punishment. The court found that the Commonwealth had failed to rebut the presumption of prejudice. All other pending claims were dismissed. (App. 49a).

The Commonwealth of Virginia and Edward W. Murray, petitioners herein, appealed Judge Kiser's order to the United States Court of Appeals for the Fourth Circuit. Stockton cross-appealed upon most of the issues rejected by the District Court. A split panel of the Fourth Circuit Court affirmed the district court's rulings. The Commonwealth's petition for rehearing and suggestion for rehearing *en banc* was denied on September 27, 1988, by a 7-4 vote. (App. 84a).

SUMMARY OF ARGUMENT

This case presents an issue of special importance which warrants the grant of a writ of certiorari. On the fundamental issue of allocating the burden of proof in cases where extraneous contact upon jurors is claimed, the federal courts of appeal are in clear and sharp conflict. The intolerable result reached by the Fourth Circuit in this case vividly illustrates the necessity of requiring a federal habeas corpus petitioner to demonstrate actual prejudice resulting from such a contact.

Smith v. Phillips, 455 U.S. 209 (1982), established that the remedy for all allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. Since *Phillips*, the federal circuits have consistently applied the "actual bias" test in cases where claimed juror partiality involves inherent juror bias. There is a decided split among the circuits, however, as to whether the *Phillips* "actual bias" test applies in cases involving extraneous contact with jurors. The Sixth Circuit has consistently ruled that *Phillips* altered the law concerning extraneous contact cases. The Ninth Circuit has also required the defendant to prove actual bias in such a case. The Fifth Circuit, while not citing *Phillips*, has ruled that the burden is on the defendant to prove that he was biased by a juror contact which occurred after the finding of guilt but prior to a separate jury sentencing procedure. The other circuits hold that the "presumptive prejudice" test applies to cases of alleged partiality as a result of extraneous contact.

In the instant case, the lower courts, in analyzing the Owl Diner incident, rejected the *Phillips* actual bias test

and failed to recognize the general principle, enunciated in *United States v. Frady*, 456 U.S. 152 (1982), that a prisoner must shoulder a substantially heavier burden on federal collateral review of his state criminal judgment than on direct appeal. Rather, the Fourth Circuit and the district court held that the extrajudicial contact with jurors was presumptively prejudicial. This test, combined with Federal Rule of Evidence 606(b), which prohibits jurors from post-trial testimony regarding their deliberative processes, placed the Commonwealth in the untenable position of having to rebut the presumption of prejudice without the benefit of the jurors' testimony regarding the effect of any such statement. Consequently, a single off-hand remark from the operator of a local diner has resulted in the invalidation of a unanimous, and presumptively valid, jury sentence.

In light of the sharp disagreement among the circuits on this important matter, this Court should grant certiorari to define the parameters of the *Phillips* decision for cases of claimed juror partiality as a result of extraneous contact, and to shed light upon the interplay between *Phillips* and Rule 606(b).

REASONS FOR GRANTING THE WRIT

THE COURTS BELOW ERRONEOUSLY FAILED TO REQUIRE STOCKTON TO DEMONSTRATE ACTUAL PREJUDICE RESULTING FROM THE OWL DINER INCIDENT.

A. *Smith v. Phillips* Established the "Actual Prejudice" Test for Questions of Juror Partiality.

This Court held in *Smith v. Phillips*, 455 U.S. 209 (1982), a federal collateral attack on a state murder conviction, that "due process does not require a new trial every time a juror is placed in a potentially compromising situation." 455 U.S. at 217. The Court ruled that a post-trial hearing was sufficient to determine whether there was in fact prejudice, stating: "This Court has long held that the remedy for allegations of *juror partiality* is a hearing in which *the defendant has the opportunity to prove actual bias*." 455 U.S. at 215 (emphasis added). The potential prejudice in *Phillips* involved a juror who failed to disclose that he had applied, during his service as a juror, for a job as an investigator with the District Attorney's office. The Court's language indicates that *Phillips* applies to all claims of juror partiality.

Although *Phillips* refers to *Remmer v. United States*, 347 U.S. 227 (1954)[1], as establishing the requirement for

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[1] In *Remmer v. United States*, 347 U.S. 227 (1954), the petitioner discovered post-trial that the jury foreman was contacted during trial and offered a bribe to find in petitioner's favor. The juror reported the incident to the judge and an FBI investigation was requested. Although the judge and prosecutors knew about the incident, petitioner and his

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an evidentiary hearing when potential juror bias is discovered after trial, the *Phillips* Court referred to the long-established remedy of a hearing in which the defendant bears the burden of proving actual bias. *Phillips* accorded neither party the advantage of a presumption of prejudice. *See* "Clean Sweep of the New Trial Safeguard Against Prejudice From Unauthorized Communications With Jury Members" 31 Wayne L. Rev. 1083, 1091-1092 (1985).

Since the *Phillips* decision, the federal circuits have consistently applied the "actual bias" test in cases of juror partiality resulting from inherent juror bias. *See, e.g., Baca v. Sullivan,* 821 F.2d 1480 (10th Cir. 1987); *United States v. DeLutis,* 722 F.2d 902 (1st Cir. 1983). The United States Court of Appeals for the Eleventh Circuit relied upon *Phillips* in deciding *Rogers v. McMullen,* 673 F.2d 1185 (11th Cir. 1982), *cert. denied,* 459 U.S. 1110 (1983). In that case, a member of the jury in the defendant's state criminal trial was 17 years old, below the minimum age for jury service in Florida. In upholding the denial of Rogers' petition for writ of habeas corpus, the Eleventh Circuit stated the general rule for cases of juror partiality or competence:

> We distill from the cases discussed above the following general rule: where a federal habeas petitioner raises a *challenge to the competence or impartiality of a*

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counsel were advised only after trial. In remanding the case for further proceedings this Court held that "any private communication, contact, or tampering directly or indirectly, with a juror during trial about the matter pending before the jury is . . . deemed presumptively prejudicial. . . ." 347 U.S. at 229.

> *juror* on Sixth and Fourteenth Amendment grounds only after the verdict is returned in his state court trial, he must be afforded the opportunity to demonstrate that the juror was actually biased or incompetent, that is, that the juror was not "capable and willing to decide the case solely on the facts before [him]." *Smith v. Phillips.*

673 F.2d at 1190 (citation omitted, emphasis added).

Likewise, the United States Court of Appeals for the Fourth Circuit relied on *Phillips* and spoke in broad terms of "juror impartiality" in *United States v. Malloy*, 758 F.2d 979 (4th Cir.), *cert. denied*, 474 U.S. 1009 (1985). The court held that the burden of proof to show "actual prejudice" lay with Malloy where a juror who sat on the panel which convicted him had previously sat on the jury at a co-defendant's trial. 758 F.2d at 982. The Fourth Circuit Court noted:

> After *Smith v. Phillips*, . . . we and other courts have required a showing of actual bias in cases involving alleged juror impartiality after a verdict has been reached.

758 F.2d at 982, n. 6 (citation omitted).

B. A Sharp Split in the Federal Circuits Exists Regarding Whether the *Phillips* "Actual Prejudice" Test Applies in Cases Where Juror Partiality is Alleged Due to Extraneous Contact with the Jury.

Two years after the *Phillips* decision, the United States Court of Appeals for the Sixth Circuit concluded that *Phillips* had altered the law concerning juror partiality, including the test applicable to claims of unauthorized communications with jurors. *United States*

v. Pennell, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985). At Pennell's trial, five jurors had received anonymous telephone calls directing them to find Pennell guilty. One juror was told to find him guilty or she would wish that she had. 737 F.2d at 529. The incidents were reported at trial and the trial court questioned members of the jury. *Id.*

On appeal, the trial judge's denial of the motion for mistrial was upheld. The *Pennell* Court acknowledged that the facts in *Phillips* involved inherent juror bias as opposed to contact by third parties, but held that the principles set forth in *Phillips* "apply to jury partiality generally." 737 F.2d at 532. The Court held: "[I]n light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed." 737 F.2d at 532. Thus, the Sixth Circuit placed the burden of showing prejudice from extraneous juror contact on the party challenging the judgment, even on direct appeal.

The Sixth Circuit recently reaffirmed *Pennell* in *United States v. Zelinka*, ___ F.2d ___ (No. 87-3725) (6th Cir. November 25, 1988). The unauthorized contact with jurors in that case occurred at a courthouse elevator. A juror reported to the judge, during trial, that a spectator who appeared to be associated with the defendant had made a comment as several jurors entered the elevator. The statement was to the effect that it would be too bad if the elevator should crash. After boarding the elevator, some of the jurors expressed fear about the comment. The trial court questioned the jurors about the incident and then refused Zelinka's motion for mistrial.

In upholding the trial court's denial of the mistrial motion,[2] the Sixth Circuit acknowledged that *Remmer* had established a "presumptive prejudice" test in cases of unauthorized juror contact. However, it continued:

> This court has consistently held that *Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless.

___ F.2d at ___[3].

The United States Court of Appeals for the Ninth Circuit in *United States v. Madrid*, 842 F.2d 1090 (9th Cir.), *cert. denied*, 109 S.Ct. 269 (1988), applied the "actual prejudice" test to a case where a juror had a brief contact with a court clerk during deliberations. The *Madrid* Court, relying on *Smith v. Phillips* and *Rushen v. Spain*, 464 U.S. 114 (1983), held that a defendant "must demonstrate 'actual prejudice' resulting from an *ex parte* contact to receive a new trial." 842 F.2d at 1093. The court noted that the contact did not involve the unauthorized submission of extraneous information and did not pertain to a fact in controversy before the jury. *Id.*

Recently, in this Court's denial of certiorari in *Andrews v. Shulsen*, 108 S.Ct. 1091 (1988), a capital case, Justice Marshall, joined by Justice Brennan in his dissent,

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[2] The Sixth Circuit reversed *Zelinka* on other grounds and remanded it for a new trial.

[3] The court also noted that the United States Court of Appeals for the First Circuit "appears to agree with this interpretation. *See Neron v. Tierney*, 841 F.2d 1197, 1200 (1st Cir. 1988). . . ." ___ F.2d ___.

noted that the defendant had been denied an evidentiary hearing. Justice Marshall wrote:

> This Court has long held that the remedy for allegations of juror partiality is a hearing *in which the defendant has the opportunity to prove actual bias. Smith v. Phillips.*

108 S.Ct. at 1092 (emphasis added, citation omitted). Significantly, the allegation of juror partiality in the *Andrews* case involved, not inherent juror bias, but an extraneous contact with jurors during trial. While members of the jury were eating lunch in a separate dining room, a juror discovered on his napkin a stick drawing depicting a hanging with the inscription "Hang the Niggers." At least one juror saw the napkin, perhaps as many as three. *Andrews v. Shulsen*, 600 F. Supp. 408, 419 (C.D. Utah 1984).

Although not relying on *Phillips*, the Fifth Circuit has held that a federal habeas corpus petitioner alleging that an extraneous contact occurred after the guilty verdict, but before a separate jury sentencing procedure, bears the burden of proving prejudice. *Miller v. Estelle*, 677 F.2d 1080 (5th Cir.), *cert. denied*, 459 U.S. 1072 (1982).

In *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), the Fifth Circuit acknowledged that *Smith v. Phillips* has been interpreted as altering the "presumptive prejudice" test in cases of extraneous contact with jurors:

> Until recently, courts generally agreed that any extrajudicial contact or material reaching the jury presumptively prejudices it. . . . Under *Remmer v. United States*, . . . the party supporting the jury's verdict

> carried a heavy burden to disprove jury prejudice. . . . However, the Supreme Court cast a forbidding shadow on these assumptions when it decided *Smith v. Phillips*. . . .

858 F.2d at 1144-1145 (citations omitted). The court noted that it had "not yet explicitly determined how *Smith v. Phillips* has affected *Remmer*." *Id.* It then determined that the measures taken by the trial court satisfied both the *Phillips* requirement and the tougher "presumptive prejudice" standard, and thus did not decide which standard controlled.

The Fifth Circuit has also required a showing by the defendant of actual prejudice where there was an allegation of "extrinsic influence" on a juror. In *De La Rosa v. Texas*, 743 F.2d 299 (5th Cir. 1984), *cert. denied*, 470 U.S. 1065 (1985), the court upheld the lower court's denial of a new trial where a member of the jury told other jurors during deliberation, that his stepfather, who had been in prison for murder, was released only to murder again. While the alleged taint was from within the ranks of the jury, it also involved extrinsic influence by injecting extrajudicial information into the jury room. The court held:

> Because De La Rosa demonstrated a colorable showing of *extrinsic* influence, the trial court properly investigated the alleged impropriety by conducting a hearing. It was incumbent upon De La Rosa to prove the existence of juror prejudice by a preponderance of the evidence. . . .

743 F.2d at 306 (emphasis added, citations omitted).

A majority of the federal circuits have not interpreted *Phillips* as requiring that defendant prove actual prejudice when alleging juror partiality due to extraneous juror

contact. In the instant case, the Fourth Circuit majority held that although the defendant must initially establish that an unauthorized contact of an inappropriate character occurred, once such a juror contact has been established, prejudice is presumed and the government bears the burden to demonstrate an absence of prejudice. *See Stockton v. Commonwealth*, 852 F.2d 740, 743 (4th Cir. 1988); (App. 53a). In *Stockton*, the court cited *Haley v. Blue Ridge Transfer*, in applying the "presumptively prejudicial" standard. The *Haley* decision, based upon *Remmer v. United States*, stated that extrajudicial contacts with jurors, "should be deemed 'presumptively prejudicial' with the burden of rebuttal resting heavily on the party supporting the jury's verdict." 802 F.2d at 1535.

Other circuits have also maintained that the "presumptive prejudice" test controls in cases of possible juror partiality resulting from extraneous contact. *See e.g., United States v. Wiley*, 846 F.2d 150 (2nd Cir. 1988); *United States v. Coleman*, 805 F.2d 474 (3rd Cir. 1986); *Owens v. Duckworth*, 727 F.2d 643 (7th Cir. 1984); *United States v. Robinson*, 756 F.2d 56 (8th Cir. 1985); *United States v. Hornung*, 848 F.2d 1040 (10th Cir. 1988); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 3265 (1987); *United States v. Butler*, 822 F.2d 1191 (D.C. Cir. 1987).

C. The Lower Courts Failed to Recognize that *Smith v. Phillips* Required Stockton To Prove Actual Bias. The Imposition Of The "Presumptive Prejudice" Standard, Combined With The Dictates Of Federal Rule Of Evidence 606(b), Precluded The Commonwealth From Presenting Its Valid Merits Defense.

The "actual prejudice" test enunciated in *Smith v. Phillips* was the appropriate standard to be applied in this

case. Stockton should have been required to prove that he was actually prejudiced. Instead, the lower courts held that the government bore the burden of establishing that Stockton had not been prejudiced, while simultaneously preventing the Commonwealth from utilizing the best and most obvious way to rebut the presumption of prejudice.

In this case, the district court imposed an analytical framework in which, once juror exposure to "any extrajudicial contacts" is established, the court presumes the contacts were prejudicial unless it finds that they were clearly innocuous. (App. 40a). Under this test, the court must then determine "whether the party supporting the verdict has rebutted the presumption of prejudice. This burden rests heavily on the party supporting the verdict." (App. 40a). The Fourth Circuit specifically rejected the argument that *Smith v. Phillips* altered the presumption of prejudice attaching to extrajudicial communications. *Stockton,* 852 F.2d at 744; (App. 61a). Relying instead on *Remmer* and *Mattox v. United States,* 146 U.S. 140 (1892), the court below affirmed the district court's use of the presumptive prejudice test. 852 F.2d at 743-744; (App. 60a - 61a).

The lower courts ignored not only the *Phillips* opinion but also the overarching principle that a petitioner on federal collateral attack of a state criminal judgment bears a heavy burden of proof. In *United States v. Frady,* 456 U.S. 152 (1982), this Court held that a petitioner on collateral review must meet a higher standard than on direct appeal. 456 U.S. at 166. In fact, the Fourth Circuit in *United States v. Malloy* relied upon *Frady* as further

support for its application of the *Phillips* "actual prejudice" standard in a juror partiality case:

> Our conclusion is further supported by the Supreme Court's decision in *United States v. Frady* . . . that the plain error standard cannot be applied to defects in the prosecution raised for the first time in a collateral attack, and that a defendant making such an attack has the burden of meeting a much higher standard.

758 F.2d at 982 (citation omitted).

The imposition by the lower courts of the "presumptive prejudice" standard, when combined with the mandates of Federal Rule of Evidence 606(b), has placed an intolerable burden on the government. In pertinent part, Rule 606(b) reads as follows:

> A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brough to bear upon any juror. . . .

Thus, while under the "presumptive prejudice" test, the government must bear the heavy burden of proving that any extraneous contact was harmless, but it may not elicit testimony from the jurors that any such conduct had no effect on their deliberations. Judge Widener noted this obvious quandary in his dissenting opinion:[4]

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[4] Judge Widener expressed doubt that Rule 606(b) "should be applied over literally so as not to permit the State to

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> To hold, as we do, that any extraneous communication to a juror is presumably prejudicial unless innocuous, and then prevent the State from proving lack of prejudice by the very juror involved, very nearly places the State in a box from which escape is difficult if not impossible.

Stockton, 852 F.2d at 750; (App. 76a). Such a situation is untenable in the abstract. It is, however, even more intolerable under the specific facts of this case.

A unanimous and presumptively valid jury sentence of death in this case has been vacated on the basis of a single off-hand remark made by an obscure operator of a local diner. Under the constraints of the analytical framework imposed by the lower courts and Fed. R. Evid. 606(b), the Commonwealth cannot defend against the claim by demonstrating that the comment had no effect on the sentencing deliberations which were all but complete when the unfortunate remark was made. This result is particularly egregious because "[e]veryone connected with the case simply thought that there was nothing to it and there was not." *Stockton*, 852 F.2d at 751 (Widener, J., concurring and dissenting); (App. 79a).

(Continued from previous page)

introduce at least some evidence from the jurors . . . to say whether or not such remarks had any effect on them personally. . . ." 852 F.2d at 750; (App. 76a). Those reservations are reinforced by this Court's observation in *Phillips* that "one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." 455 U.S. at 217, n.7 (citations omitted).

CONCLUSION

There exists a clear conflict among the various circuits regarding the appropriate standard by which to review a claim of juror partiality as a result of extraneous juror contact. The conflict is most apparent between the position taken by the Fourth Circuit in the instant case and that adopted by the Sixth Circuit in *Pennell*. Indeed, the Sixth Circuit has acknowledged the split: "[A]t least two courts of appeals have expressly disagreed with *Pennell*. [citation omitted]. Other courts continue to apply *Remmer* as if *Smith v. Phillips* made no change in the burden of proof. Nevertheless, *Pennell* remains the controlling decision in this circuit." *United States v. Zelinka*, ___ F.2d at ___. The scope of the *Phillips* decision and the appropriate standard for cases involving outside contact upon a jury are important issues that need to be addressed to establish uniformity in the disposition of federal habeas corpus actions in all circuits. This need for uniformity and the confusion created by the clear and substantial conflict among the circuits provide compelling bases for the exercise of the Court's certiorari jurisdiction. *See Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

DENNIS WALDON STOCKTON, *Petitioner,* v. COMMONWEALTH OF VIRGINIA, and EDWARD W. MURRAY, DIRECTOR DEPARTMENT OF CORRECTIONS. *Respondents.*	)	Civil Action No. 86-0106-D *ORDER* By: Hon. Jackson L. Kiser United States District Judge

In accordance with the written Memorandum Opinion entered this day, it is hereby

ADJUDGED AND ORDERED

as follows:

(1) an evidentiary hearing shall be scheduled forthwith on the claim involving petitioner's denial of a fair trial by an impartial jury due to outside influence on the jury during the deliberations at the sentencing phase of the trial; and on the issue of whether improper deliberation took place;

(2) the remaining claims in the petition for a writ of habeas corpus are dismissed.

The Clerk is directed to send a certified copy of this Order and accompanying Memorandum Opinion to counsel of record for petitioner and respondents.

ENTER: This 27th day of January, 1987.

/s/ Jackson L. Kiser
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

DENNIS WALDON STOCKTON,	)	Civil Action No. 86-0106-D
Petitioner,	)	
v.	)	**MEMORANDUM OPINION**
COMMONWEALTH OF VIRGINIA, and EDWARD W. MURRAY, DIRECTOR DEPARTMENT OF CORRECTIONS.	)	By: Jackson L. Kiser United States District Judge
Respondents.	)	

Dennis W. Stockton, a Virginia prisoner, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking the constitutionality of his conviction. Following a jury trial in the Circuit Court of Patrick County, Stockton was found guilty on March 23, 1983 of capital murder for the willful, deliberate and premeditated killing for hire of Kenneth Arnder, and on March 24, 1983 the jury fixed his punishment at death. The trial court entered final judgment and imposed the recommended sentence on June 7, 1983. In attacking the constitutionality of the aforesaid conviction and sentence, petitioner raises the following allegations:

(a) petitioner was denied his constitutional right to be tried by an impartial jury due to the trial court's refusal to permit a change of venue and due to prejudicial contacts resulting from the judge's denial of the motion to sequester the jury;

(b) petitioner was denied his right to a fair trial by the introduction of evidence of another murder allegedly committed by petitioner;

(c) petitioner was denied his right to a fair trial due to prosecutorial misconduct by the Commonwealth's Attorney when the prosecutors:

(1) indicted defense witness Tommy McBride as a co-conspirator in the Arnder Murder solely to impeach McBride's testimony at trial as evidenced by the fact that the indictment was nolle prossed shortly after Stockton was sentenced; and improperly exceeded the scope of direct examination when cross-examining Stockton; and

(2) improperly elicited false testimony from a key Commonwealth witness, Ricky Williams;

(d) petitioner was denied his right to a fair trial as a result of the Commonwealth's denial of a new trial upon after-discovered evidence showing the chief prosecution witness, Randy Bowman, had lied; and

(e) even if each allegation considered in isolation does not alone constitute deprivation of due process, when considered cumulatively, they may be found to have resulted in a unfair trial.

Respondents submit that all available state remedies have been exhausted and that this petition is ripe for consideration.

A hearing was held in this matter on December 16, 1986. Counsel for petitioner argued that an evidentiary hearing should be held as the petition clearly showed that constitutional errors had been committed during Stockton's trial, particularly regarding the question of jury bias. Petitioner avers that the state trial court had merely given this issue perfunctory consideration and, thus, he is entitled to a full evidentiary hearing. Further, petitioner argues that an evidentiary hearing is necessary to enable him to present newly-discovered evidence that

a key witness for the prosecution lied when he testified at petitioner's trial.

I.

A. Denial of Fair Trial by an Impartial Jury.

Petitioner argues that it was prejudicial error for the trial court to deny a change of venue because of pre-trial publicity. Petitioner points out that Patrick County is a small rural county with a population of less that 20,000 people. There are several newspapers published both in Stuart, the town in which petitioner was tried, and in nearby communities. According to petitioner, beginning as early as June of 1982, the local papers began running a steady stream of reports, updates and commentaries about the case and continued coverage during the trial. Petitioner avers that although some of the articles were based on facts alone, many were based on speculation, untested conclusion, and sensationalistic assertions.

In a pre-trial hearing on March 8, 1983, petitioner moved for a change of venue based on pre-trial publicity. Stockton was called to the stand to identify and introduce over fifteen newspaper articles about his trial and related matters. (App. 287-307, and Defendant's Exhibits 1-15). Stockton testified that the articles introduced represented only about one-third of the articles he had seen. He also testified that he had heard various stories on two North Carolina television stations (WXII, Channel 12 in Winston-Salem and WFMY TV, Channel 2 in Greensboro) and several radio stations (WHED of Stuart, WSLQ of Roanoke, WKZL and WTQR both of Winston Salem and

WPAQ of Mt. Airy). Stockton contended that not everything in the news accounts were accurate and that the newspapers had distorted the truth. Petitioner's counsel also called Mr. Kenneth Haynes, a reporter for the Winston-Salem Journal. Haynes had written an article about Stockton entitled "Meet Surry County's Public Enemy No. 1" which appeared in the Journal on Sunday, July 18, 1982. Haynes testified that he had been following the case and believed the article about Stockton was of interest to the Journal's readership. Haynes stated that although some of the sources for this feature article were not factual, that he would not report or use inaccurate or inflamatory information and that he considered his sources to be reliable. (*See* App. 319 and Defendant's Exhibit No. 6). Haynes testified that the Journal's circulation in Patrick County is approximately 250 on weekdays and approximately 400 on Sundays. The total Journal circulation was around 100,000. On the Sunday the article appeared, Haynes testified that it had been placed on the front page of the B section of the paper. (App. 315-316). Upon redirect examination Haynes conceded that his article might have had a prejudicial or inflamatory effect upon those who read it against Stockton. (App. 320)

Stockton introduced a total of eighteen different articles. (Defendant's Exhibits 1-15) from the following newspapers at a pre-trial hearing on March 8, 1983:

(1) the Winston-Salem Journal – four articles which appeared on June 25, 1982, June 29, 1982, July 18, 1982 and August 18, 1982;

(2) the Mt. Airy News – eight articles which appeared on June 25, 1982, June 28 and June 29, 1982, July 21, 1982, August 17, and 18, 1982, September 14, 1982 and October 13, 1982;

(3) the Bull Mt. Bugle – three articles which appeared on August 18, 1982, August 25, 1982 and October 6, 1982; and

(4) the Stuart Enterprise – three articles which appeared on September 15, 1982 (two different articles) and October 13, 1982.

In addition to these articles, Stockton introduced several other articles during an *in camera* proceeding on the first day of trial, March 21, 1983, in which defense counsel renewed its motion for a change of venue. The articles introduced appeared in the following newspapers:

(1) the Winston-Salem Journal – one article appearing on March 9, 1983;

(2) the Mt. Airy News – three articles appearing on March 8, 9, and 10;

(3) the Bull Mt. Bugle – three articles appearing on March 9 (two articles) and March 16, 1983;

(4) the Stuart Enterprise – one article appearing on March 16, 1983; and

(5) the Martinsville Bulletin – two articles appearing on March 9, 1983 and on March 20, 1983.

Petitioner argues that in light of the extensive nature of the pre-trial publicity, the trial court failed to sufficiently interrogate the jurors as to their impartiality. Petitioner argues that it was the duty of the trial court to look beyond the juror's answer that he could be impartial and to do a detailed examination of what information the juror possessed, its sources and what effect, if any, it had on that juror.

The record shows that twenty-nine veniremen were called in order to select a panel of twenty jurors and four alternates. *Voir dire* was held in chambers in groups of

five. Of the five jurors excluded, one was disqualified because he was a friend of one of the witnesses for the Commonwealth (App. 502), another juror was struck because Stockton had been accused of shooting into her store (App. 504), one was disqualified because she had dated the investigating officer (App. 523), another was excluded because she stated that she could not vote for the death penalty (App. 531, 545-546), and the last juror disqualified had indicated that she had already formed an opinion concerning Stockton's guilt (App. 549).

During *voir dire,* the court and the attorneys specifically asked whether the prospective jurors had read about this case in the newspapers or had otherwise heard about it and whether they had formed an opinion about the case (App. 482-583). Of the first panel of five, two veniremen indicated they had read articles about the case but that they had not formed an opinion about the case. (App. 486-487, 490-491). One of those was struck during the preemptory challenge. (App. 111). Out of the five prospective jurors on the second panel, only one person indicated having read something about the case and indicated it had not made an impression on her. (App. 508). One juror on the third panel stated that she had only heard about the case on the radio but it had not caused her to form an opinion. (App. 514) Another juror stated that he had read about the case but indicated that he could be impartial when evidence was presented. (App. 517-518). When asked whether anyone on the fourth panel had read any news articles or heard anything on the radio or heard anything by word of mouth about the case, only one juror indicated that he had read one article about it. He responded negatively when asked whether

this caused him to form any kind of opinion. (App. 526). A juror on the fifth panel stated that from what she had read in the papers, she had decided he was guilty (App. 548-549). The court promptly excluded her. Another juror on that panel also indicated that although he had read about the case in the papers he could base his decision on the evidence presented during the trial. (App. 550-552, 555). The last panel of veniremen was made up of four for the purpose of selecting two alternates. Only one of the four indicated that she had read about the case in the paper. (App. 572). She was one of the two prospective jurors struck by the attorneys. (App. 112). Thus, from the panel of twenty, twelve jurors and two alternates were sworn.

After Stockton was arraigned, the court heard several motions by defense counsel in chambers. Among them was defense counsel's renewed motion for a change of venue. Counsel submitted several additional news articles into evidence concerned with the case. These articles from various newspapers have been previously noted herein. Counsel conceded that even though most of the jurors had some knowledge of the case, in the final analysis they had stated that they could sit impartially. Counsel, however, argued that because of the identification of Stockton in these articles as a Charles Manson type and as public enemy number one, and because of reference to crimes not involving this particular case, the court should grant the motion. Counsel for the Commonwealth argued that the articles presented were merely factual renditions of things that had gone on before and that there was "nothing in them which could be construed to be inflamatory or otherwise prejudicial against the defendant, and

each of the jurors indicated that they didn't really believe everything that they read in the paper and that they could base their decision fairly and impartially on the evidence". (App. 595). The Commonwealth Attorney further pointed out none of the jurors seated indicated that they had seen any of the articles which defense counsel had characterized as being inflamatory. Without making specific findings, defense counsel's motion was overruled by the court. (App. 595).

One preciously guarded right is the right guaranteed by the Sixth and Fourteenth Amendments to a fair trial by a panel of impartial jurors. *See Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). Prospective jurors are presumed to be impartial. *Id. See also Well v. Superintendent*, 553 F.2d 359 (4th Cir. 1977). Whenever there has been pre-trial publicity surrounding a case, the trial court has the duty to exercise its broad discretionary powers to ensure that the necessary conditions for a fair trial have been met. *See United States v. Abbott Laboratores*, 505 F.2d 565 (4th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975). The totality of the circumstances must be considered by the trial court in determining whether a change of venue is necessary due to pre-trial publicity. *Accord Sheppard v. Maxwell*, 384 U.S. at 352; *see also Irvin v. Dowd*, 366 U.S. 717, 728 (1961). *See also Wamsley v. Slayton, supra; Greenfield v. Robinson*, 413 F.Supp. 1113 (W.D.Va. 1975). And it is the duty of the appellate tribunals to make an independant evaluation of the circumstances. *Sheppard v. Maxwell*, 384 U.S. at 362. Where there is a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge

should continue the case until the threat abates, or transfer it to a different county not so permeated with publicity." *Id.* at 363.

Of the factors which the trial courts may take into consideration when determining whether a change of venue is warranted are the nature and extent of the pre-trial publicity, the size of the community and the impact of the publicity on the people of the community. *See generally Irvin v. Dowd, supra, Sheppard v. Maxwell, supra, Murphy v. Florida,* 421 U.S. 794, 798 (1975), and *Patton v. Yount,* 467 U.S. ___ (1983). A thorough and skillfully conducted *voir dire* should be adequate to identify juror bias resulting from any pre-trial publicity.

The Supreme Court has specifically rejected the view that actual prejudice on the part of the jury might be inferred from pre-trial publicity and the answers at *voir dire* of veniremen not selected for the jury. *Patton v. Yount, supra.* It has long been recognized that prospective jurors are presumed to be impartial, but that jurors need not be totally ignorant of the facts and issues involved in a case; particularily in criminal cases. *Irvin v. Dowd,* 384 U.S. at 722. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Id.* at 723. This is a constitutional standard and a question of federal law. Whether a juror can in fact meet this legal standard is a determination which must be made by the trial court. To this determination, the federal habeas court owes special deference because the trial judge is in the best position to observe and consider the character and demeanor of the prospective jurors when being questioned by the attorneys and when responding to his own questions.

There is a presumption of correctness to the state court's factual findings, and unless those findings are not fairly supported by the record as a whole, this federal court upon habeas review must accept those findings. *See 28 U.S.C. § 2254(d); Sumner v. Mata,* 449 U.S. 539 (1981); *Marshall v. Loneberger,* 459 U.S. 849-852 (1983). *See also Townsend v. Sain,* 372 U.S. 293, 313 (1963) (which set the guidelines for determining when federal habeas courts must grant evidentiary hearings). *See Shrader v. Riddle* 401 F.Supp. 1345, 1349 (W.D. Va. 1975), *aff'd,* 551 F.2d 309 (4th Cir. 1977) (where the district court held, after reviewing the findings below, that the finding of a trial court on the issue of the force of a prospective juror's opinion must be *constitutionally deficient* to warrant granting habeas corpus). (Emphasis added).

Upon review of the pertinent parts of the record, I can find no proof as to how widely the news accounts were circulated in Patrick County. There is evidence of a number of articles, but many of these articles appeared in out-of-town papers. Other than a reporter's opinion about the circulation of the Winston-Salem Journal in Patrick County, there is no evidence as to what the circulation of these papers were at the time. Nor is there any evidence about the circulation of the local papers.

Assuming there was a very great circulation of all the papers carrying articles about the cases, any prejudice which could be presumed was clearly rebutted during *voir dire.* On the whole, the jurors answered that they had little or no knowledge of the various new accounts. Defense counsel did not offer evidence to show that people in the community were biased against Stockton or that people in the community believed that Stockton

could not get a fair trial due to the extensive media coverage of the case. Therefore, regardless of the amount of pre-trial publicity the case received, and to which the prospective jurors were exposed, the publicity obviously had little effect on the majority of the jurors. Only one juror indicated that her mind was made up based upon the news accounts. Although defense counsel did not aggressively pursue unanswered questions regarding which news accounts the jurors had read, counsel may have tactically decided not to do so because a more extensive answer may have prejudiced other prospective jury members. Because the *voir dire* was conducted in panels of five, the possibility of prejudicing the other jurors existed. However, I find no evidence or indication that any juror was swayed by the responses given by the other jurors on the panel.

Based on the record, I find that the *voir dire* was conducted in a manner sufficient to identify juror bias resulting from the publicity attendant to this case. Further, I find that the evidence before the court concerning the nature and extent of the pre-trial publicity, the size of the community and the impact of the publicity on the people of the community was sufficient for the court to have made an informed decision about whether a change of venue was warranted. I find nothing constitutionally deficient in the judge's decision to warrant a hearing on this issue.

Petitioner also argues that he was denied the right to be tried by an impartial jury due to prejudicial contacts resulting from the judge's denial of the motion to sequester the jury. Specifically, petitioner argues that had the jury been sequestered several jurors would not have been

exposed to extraneous comments during their deliberations in the sentencing phase. Petitioner contends that it was the duty of the trial court to examine each juror regarding any outside influence which may have been exerted upon him.

The record shows that defense counsel made a motion at a preliminary hearing on September 27, 1982, six months prior to trial to sequester the jury. This motion was denied at that time as being speculative. Counsel did not renew the motion. On the day the pre-sentence report was returned to the court, June 7, 1983, defense counsel presented two witensses to support his motion to set aside the verdict. The witnesses testified that on the day the jury had fixed Stockton's punishment, March 24, 1983, they had overheard three or four of the jurors discussing the case during lunch with the owner of the diner. Mrs. Blackard testified that she and her husband were sitting in the booth next to the jurors, one of whom was the foreman, and that

> [T]hey were sitting together and, ah, Glen Puckett, the owner of the diner came up and was talking to them about the trial. He wanted to know if they had reached a verdict and one of them, I did not know which one, said that all of them had decided except for one woman, something to the effect is what was said. (App. 1028).

On cross-examination, Mrs. Blackard stated that the jurors and Mr. Puckett talked for five or ten minutes but that she did not know what was being said. (App. 1029).

Mr. Blackard testified that he was sitting on the other side of the booth and he "was paying attention to what they were saying but I couldn't really hear what they was

saying good but I know they was talking about the trial." (App. 1030). Mr. Blackard further stated when asked who was taking about the trial that it was with Glen Puckett."

The following exchange then took place:

> Q. With Mr. Puckett. And how do you know they were talking about the trial and not talking about fishing or hunting or something?
>
> A. Well, ah, Glen came up and asked them if they'd come to a verdict yet and, ah, the best of my knowledge, they said they had all except for one, ah, one person, no, he said for one reason and, ah, Mr. Puckett said what's that; he said haven't you guessed yet, it's a damned woman. And then, ah, as I recall, Glen Puckett says something to the effect, said I hope they fry that son-of-a-bitch.
>
> Q. Do you recall any other parts of the discussion?
>
> A. They, let's see, I walked into the diner, this was before Glen came up there and sit down, and I went by and asked them if they'd come to a decision yet and they said all of them had but one. That's all they said to me but the day before that they was talking about it.
>
> Q. Well, if you couldn't hear what they were saying, how do you know what they were talking about?
>
> A. Why else would somebody get down and whisper?

One cross-examination, Mr. Blackard admitted that he had been subpoenaed to testify in the case on behalf of Mr. Stockton and that he had been convicted of four felonies and two misdemeanors. The Commonwealth Attorney asked the court to take "judicial notice of the records and proceedings of this court in the case of *Commonwealth v. Stockton* at which time the court upon

each recess admonished the jury that they were not to discuss the case among themselves or among any one else at any time during any recess." (App. 1033).

The foreman of the jury, Mr. Cockram was called to the stand by the Commonwealth. The following testimony was elicited:

> Q. You've heard the statements made by Mr. and Mrs. Blackard, have you not?
>
> A. Yes.
>
> Q. Will you tell the court, make any comments you like about the statements that you've just heard them make as to the truth or falsity thereof.
>
> A. Ah, basically, the comments, ah, ah, I, personally, don't know Mr. Puckett at the Owl Diner. I think I would recognize him if I saw him but, ah, several people had met us, you know, asked us what's going on. Ah, you know, you make a general statement that, ah, we think we'll finish up this afternoon but to the best of my knowledge there was no discussion of any of the particulars of the case, ah. . . .
>
> Q. Was there any discussion about the nuts and bolts of the case?
>
> A. No, sir.
>
> Q. Ah, you heard Mr. Blackard suggest that, ah, one of the jurors said something about a damed woman, do you recall that statement?
>
> A. No, sir.
>
> Q. If you'd heard it, do you feel that you would recall it or do you have any feelings about that?
>
> A. I'm not sure, Mr. Burton. Like I say, I don't know Mr. Puckett personally. Ah, he did stop by the booth to talk to us and, ah, I did not feel like I was talking to him because I don't have a personal contact or knowledge with the man.

> Q. Do you personally feel that any of the comments that you heard from persons other than menbers of the jury had any influence on you verdict?
>
> A. No, sir.

(App. 1033-34)

On cross examination, Mr. Cockram stated that other than the general inquiries about whether a decision had been reached, no other comments were made to them nor did any other discussions take place concerning the case. (App. 1035).

After hearing counsel's arguments on the motion to strike the verdict, the court found as follows:

> All right, gentlemen. If I understood Mr. and Mr. Blackard's statement as to what they heard was said, was that this Mr. Puckett asked if they had reached a decision and some comment was made they all decided but one woman. I feel that that statement in itself is not prejudicial, not harmful and Mr. Puckett (sic) says they didn't discuss anything further Mr. and Mrs. Blackard seem to suspect that maybe something else was said but they don't know what was said. So, based upon that, I see no harm or prejudice in the statement that was made and I'll overrule the motion.

(App. 1038-39).

The determination of whether the jury should be sequestered is discretionary with the trial judge. The mere fact that has been media coverage does not require a trial court to sequester the jury, even in capital cases. *See Justus v. Commonwealth,* 222 Va. 667, 283 S.E. 2d 905, 910-11 (1981), *cert. denied,* 455 U.S. 983 (1982), and *Turner v. Commonwealth,* 221 Va. 513, 525, 273 S.E. 2d 36, 43 (1980). Where there is serious risk or prejudicial influence

on the jury during the trial, the judge should consider sequestration of the jury *sua sponte*. *Sheppard v. Maxwell, supra*. Also relative to this issue is whether the trial judge appropriately warned the jurors during the trial not to discuss the case with others and not to listen to or read media coverage of the case.

The same factors relative to the court's determination of the appropriateness of a change of venue are to be considered when determining whether to sequester the jury. *See generally Sheppard*. And if there is fair support in the record for the judge's determination, the decision is binding on the federal habeas court. 28 U.S.C. § 2254(d).

Petitioner has failed to show that the trial judge erred in not sequestering the jury despite the pre-trial publicity and media coverage during the trial. The decision of whether or not to sequester the jury is discretionary with the trial judge. Based on the record, I cannot find that there was the type of serious risk of prejudicial influence on the jury during the trial which would necessitate sequestration of the jury. The record shows that the court admonished the jurors not to read or listen to news accounts and not to discuss the case with anyone. Petitioner is not entitled to habeas relief upon this point.

However, where defense counsel put the question before the court of whether the jurors had been exposed to extraneous comment during their deliberation, the trial court had the duty to determine whether the alleged comments in any way influenced the juror's decisions. In this case, two eye witnesses testified that they had overheard discussion about the case. Only one juror was called to testify. The other three jurors present at the

diner with Mr. Cockram on the last day of trail were not called. It is conceivable that the lapse of time between the last day of trial, March 24, 1983, and the date of this hearing, June 7, 1983, could have dulled the memory of what exactly was said. One witness testified that the jurors had talked with Mr. Puckett for about five or ten minutes after Mr. Puckett stated his opinion concerning Stockton's sentence. The trial judge after hearing the testimony of the three witnesses, merely denied Stockton's motion to set aside the verdict. No detailed findings of fact were made on the issue of whether the extraneous comments had affected the jury's decision to fix Stockton's penalty at death.

An issue not specifically raised by the defense counsel, but is one which is closely related to the issue of outside influence on the jury is whether there was discussion about the case among several of the jurors outside the jury room and outside the presence of the other jurors. I find that despite the adequacy of whatever warning was given by the trial judge, there was testimony by the two witnesses which circumstantially raises the issue of whether improper jury deliberations took place. The testimony raises the suspicion that the jurors at the table in the Owl Diner were talking about the case on at least two occasions. This issue alone presents a question of federal law which warrants further inquiry.

Therefore, based upon the record, I find that Stockton has not received a full and fair hearing on the above cited issues. The trial court's opinion that the comments made to the jurors were not harmful or prejudicial was not based on sufficient evidence. Under the circumstances, a more detailed examination of the issue of juror influence

or impartiality was warranted. Also, the question of improper jury deliberation was not addressed and warrants further inquiry. Rather than engage in conjecture, I am of the opinion that a hearing is necessary to resolve the questions raised above.

B. Denial of Fair Trial by the Introduction of Evidence of Another Murder

The next issue petitioner raises is that he was denied a fair trial by introduction of evidence indicating that petitioner had murdered Ronnie Tate in order to keep Tate from telling others about the Arnder murder. At the hearing before this court, petitioner conceded that the evidence of the Tate murder was probative and relevant, but argued that it was so inflamatory that the prejudice outweighed the probative value, and so infected the trial as to deny Stockton a fair trial.

The record shows that the testimony about the Tate murder developed this way: Prior to trial, defense counsel made a motion to suppress any testimony about the Tate murder. The Commonwealth opposed the motion stating that it simply sought to introduce the bare fact that Tate had been murdered by Stockton because Tate had been running his mouth about the Ardner murder. At trial, the Commonwealth did as it said it would do, i.e. simply introduced testimony through the witness, Gates, that Stockton confronted Tate and told him he had been running his mouth about the Ardner murder and then shot him. Subsequently, Stockton took the stand and testified that he had shot Tate in self-defense. It was in rebuttal that the gory details of the Tate murder were disclosed. The Commonwealth offered the details to corroborate the theory that Tate had been murdered rather

than having been killed in self-defense. (App. 728-755, 810-813 and 825-827).

The admissibility of evidence is a matter of state law and ordinarily is not reviewable by a federal court in habeas corpus proceedings. *Moore v. Illinois*, 408 U.S. 786 (1972); *Grundler v. North Carolina*, 283 F.2d 798 (4th Cir. 1960). It is only when an erroneous ruling on admissibility of evidence infringes on fundamental fairness or some specific constitutional protections *and is so prejudicial* as to deprive the defendant of a fair trial that a question warranting federal review is presented. *Anderson v. Maggio*, 555 F.2d 447 (4th Cir. 1977); *Alley v. Paderick*, 373 F.Supp. 918 (W.D.Va. 1974). (Emphasis added.) The findings made by the state court system are presumed to be correct unless one of the seven conditions set forth in 28 U.S.C. § 2254(d) is found to exist by the federal habeas court. If none of those conditions are found to exist or unless the relevant state determination is not "fairly supported by the record," "the burden is on the petitioner to establish by convincing evidence that the factual determination by the court was erroneous." *Sumner v. Mata*, 449 U.S. 539, (1981).

Generally, evidence that the accused committed other crimes similar to the offense charged is inadmissable to prove the crime charged or to prove defendant's propensity to commit the crime charged. *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E. 2d 802, 805 (1970). However, just as the Federal Rules of Civil Procedure, Rule 404(b) recognize, certain exceptions are allowed:

> Evidence of other offenses is . . . permissible in cases where the *motive, intent or knowledge of the accused is involved, or where the evidence is connected with or leads up*

to the offense for which the accused is on trial. Also, testimony of other crimes is admissible where the other crimes constitute a part of the general scheme of which the crime charged is a part.

Id. (Emphasis original.) *See United States v. Shackleford,* 738 F.2d 776, 779 (7th Cir. 1984) (admissibility of such evidence under Rule 404(b)).

The conduct of an accused following the crime is often relevant, particularly when its purpose is to conceal his guilt. *Pearson v. Commonwealth,* 221 Va. 936, 946, 275 S.E. 2d 893, 900 (1981). Where the relevancy and probative value of the evidence or other crimes greatly outweighs the prejudicial effect, admission of this evidence is proper. *See Lewis v. Commonwealth,* 225 Va. 497, 502, 303 S.E.2d 890, 893 (1983).

However, if the probative value is substantially outweighed by the danger of unfair prejudice, the evidence should not be admitted. *See United States v. Jamar,* 561 F.2d 1103, 1106, (4th Cir. 1977); *United States v. Smith,* 446 F.2d 200, 203-04 (4th Cir. 1971). If prejudicial evidence were erroneously admitted, the reviewing court must determine what effect the error had or reasonably may have had upon the jury's decision. *See,* for example, *Kotteakos v. United States,* 328 U.S. 750, 764 (1946). Only if it is determined that the error did not influence the jury, or had but very slight effect, and that the judgment was not substantially swayed by the error, then the admission of the evidence is harmless error. *Id.* at 764-65. The erroneous admission of the evidence is harmless error particularly when the government's other evidence is overwhelming. *See United States v. Reed,* 647 F.2d 678, 687 (6th Cir.), *cert. denied,* 454 U.S. 837, 1037 (1981) (harmless

error found where strength of government's case was overwhelming and the other evidence was exceptionally conclusive.

I am of the opinion that the evidence of the Tate murder was an evidentiary question where the discretion of the trial judge controlled the admission of that evidence. Because the evidence was relevant and probative, a matter which petitioner concedes, I cannot find that the trial judge's decision to exercise his discretion and admit the evidence was an abuse of that discretion. Petitioner is not entitled to a hearing on this issue nor is he entitled to habeas corpus relief upon this claim.

C. Prosecutorial Misconduct

The third issue petitioner cites as constitutional error is prosecutorial misconduct. Under this heading petitioner cites two main points and two subpoints avers that these events constitute prosecutorial misconduct rising to constitutional error. First, petitioner argues that the Commonwealth employed improper tactics to discredit Mr. Stockton and a witness for the defense, Tommy McBride. Petitioner cites that McBride indictment as being a tool for impeaching McBride's credibility since the charge was Nolle Prossed shortly after Stockton was sentenced. Petitioner also contends that on two occassions, the Commonwealth's cross-examination of Stockton rose to a level of misconduct. One was after the Commonwealth had been allowed to make Stockton its witness, a question was asked which placed before the jury extraneous and prejudicial testimony. The other instance was when the Commonwealth tried to impeach Stockton by asking if he

had ever lied under oath. For the second main point, petitioner argues that Ricky Williams testified that he had voluntarily come forward to give testimony in the trial when, in fact, the information gleaned from Williams was a result of an interrogation by Investigator Gregory. The interrogation was about another crime, but during the course of questioning Williams gave information with regard to the Stockton case. It is petitioner's argument that the fact the information was dug out by an investigator rather than having been voluntarily produced by Williams was withheld from the defense and that it was exculpatory in that it impeaches Williams's motivation for testifying.

In response, the Commonwealth argues that it is sheer speculation that the Commonwealth indicted McBride for ulterior reasons. The Commonwealth states that because McBride had a long string of prior convictions, the fact that he had been indicted sould have been of little consequence anyway. The Commonwealth further argues that the defense counsel raised no objection to the use of the indictment in cross-examination. As for petitioner's allegation that the Commonwealth improperly cross-examined Stockton, respondent contends that the objection was not properly made during trial, and therefore, federal habeas review is barred. Respondent states that because the Virginia Supreme Court determined that defense counsel had procedurally defaulted, that finding is binding on this court. In response to the last point, the Commonwealth argues that petitioner failed to show that the testimony by Ricky Williams was false and characterized petitioner's attempt to show that Williams did not voluntarily come forward as semantic acrobatics.

The "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial . . . " *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Factual determination made by the state trial court or state appeallate court are entitled to a presumption of correctness. *Sumner v. Mata, supra.* If prosecutorial misconduct is found, the effect of that conduct on the trial as a whole must be determined. If the effect is such that without the misconduct, there is a reasonable probability that the outcome of the trial would have been different, then petitioner may be entitled to habeas corpus relief.

Inflamatory, prejudicial statements made by, or elicited by a state prosecutor evidencing a desire to improperly prejudice the defendant, may be serious enough to warrant federal habeas corpus relief. *Rose v. Duckworth,* 767 F.2d 402, 405 (7th Cir. 1985). *See also Miller v. State of North Carolina,* 583 F.2d 701, 706 (4th Cir. 1978). "In order to rise to a level of constitutional error, prosecutorial misconduct that does not implicate a specific provision in the Bill of Rights must have been so egregious that it deprived the defendant of a fair trial, thus making the resulting conviction a denial of due process." *Rose v. Duckworth, supra.* The reviewing court must consider the allegedly erroneous acts in the context of the entire trial in order to determine the effect of the alleged prosecutorial misconduct.

Several factors have been set forth and followed by the Circuit Courts of Appeals to examine allegations of prosecutorial misconduct. *See Rose v. Duckworth, supra; Miller v. State of North Carolina, supra* at 707. Among those factors are:

1. Whether the prosecutor's actions were intended to reflect unfairly on the defendant's guilt or innocence or whether they were so prejudicial or inflammatory that they would clearly imply that the defendant was guilty of the crime charged;

2. Whether the remarks or actions were isolated or extensive;

3. Whether the evidence of guilt was otherwise overwhelming; and

4. Whether any curative instructions were given and when?

A determination of the intent of the prosecutor to act unfairly is a finding of fact which requires making inferences from objective facts and circumstances. *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982). Findings of fact by a state court must be given a presumption of correctness. *Sumner v. Mata, supra*. And where there is fair support in the record for the state court's finding, the federal habeas court is bound by that finding and cannot substitute its own judgment.

Based upon a review of the record, I am of the opinion that the Commonwealth Attorney engaged in a vigorous prosecution of the case, but that such conduct in the context of the trial, did not rise to a level of constitutional error. With regard to the McBride indictment, there is nothing in the record, other than speculation by the defense attorney, to show that the Commonwealth was motivated to indict McBride solely to discredit him in the Stockton trial. Obviously, a timely objection by defense counsel to exclude any mention of or reference to the indictment would have been sufficient to prevent the jury from hearing about the indictment. According to case law, the alleged prosecutorial misconduct in indicting

McBride would have had to have been so prejudicial to Stockton's defense that is clearly deprived Stockton of a fair trial. The trial judge opined that he had great difficulty in guessing the motives of the prosecution and in seeing how the McBride indictment in any way prejudiced Stockton in the trial. The judge overruled counsel's motion and objection to the reference to the indictment. (App. 1050-1052). Similarly, in view of McBride's very deep involvement in the whole case and his prior criminal record, I find that this indictment had very little bearing on his credibility. Therefore, I find that in absence of a showing of intentional use of the indictment as an impeachment tool and absent a showing of actual prejudice to Stockton's defense, petitioner is not entitled to relief upon this claim.

Under Virginia's contemporaneous objection rule, objections must be made at the time errors are committed or consideration thereof will be waived. *Rules of Virginia Supreme Court*, Rule 5:25. The state court's finding that a party has procedurally defaulted is a matter of state procedure which is binding on the federal courts. *Smith v. Wainwright*, 777 F.2d 609 (11th Cir. 1985); *Guzewicz v. Slayton*, 366 F.Supp. 1402 (E.D.Va. 1973). Failure to comply with the state's contemporary objection rule bars consideration of the challenged evidence by the federal habeas court unless "cause and prejudice" can be established. *Murray v. Carrier, supra.; Wainwright v. Sykes, supra.*

Petitioner has failed to establish that this court's review of the claims that the prosecution used improper tactics in its cross-examination of Stockton is not barred by reason of petitioner's procedural default. Therefore, review of the merits of these claims is barred.

The knowing use of false testimony by the state in a criminal proceeding violates the defendant's right to due process. *Giglio v. United States*, 405 U.S. 150 (1972). Where the state prosecutor presents false testimony, knowing the testimony to be false, and where this testimony is material to the guilt or innocence of defendant, the state prosecutor has violated defendant's constitutional rights. *Id.* In addition to establishing a knowing use of false testimony, the petitioner must satisfy the test of the materiality of the testimony: where there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. *See United States v. Bagley*, 473 U.S. ___, 105 S.Ct. 3375, 3384 (1985) (concerning the withholding of evidence by the government which petitioner could have used to impeach the government's two chief witnesses).

The Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), established the rule that the suppression of exculpatory evidence constitutes a denial of due process vitiating a conviction in three distinct types of situations. *See also Moore v. Illinois*, 408 U.S. 786 (1972). Applicable to the case at bar, petitioner cites one of those situations: "where the prosecutor's case includes perjured testimony, the prosecution knew or should have known of the perjury but failed to disclose the fact, and there is any reasonable liklihood that the false testimony could have affected the judgment of the jury." *Id.* The Court does not recognize any constitutionally significant distinction between disclosure of impeachment evidence which might have shown bias or interest on the part of the government

witnesses and exculpatory evidence. *United States v. Bagley, supra.* If petitioner shows that suppression of evidence has in some way directly restricted the scope of cross-examination of the prosecution's witness and denied the defendant the right of effective cross-examination, constitutional error is established. If the defense were free to "cross-examine the witness on any relevant subject, including possible bias or interest resulting from inducements made by the [g]overnment," then it cannot be found that there was a direct restriction on the scope of cross-examination. *Id.* A constitutional error occurs only if the evidence is material to proving the crime charged.

Upon review of the pertinent parts of the record regarding testimony given by Ricky Williams, I am of the opinion that petitioner's argument is very weak. At best, Williams' statement that he came forth voluntarily goes to his credibility. More important, however, is the fact that there is a semantic argument which can totally justify the action of the prosecutor in that Williams did, in fact, come forward by waiving his Fifth Amendment right not to testify. In this sense, his testimony is not perjurious as alleged by petitioner. Additionally, petitioner has failed to show that the statements made by Williams were false, that the Commonwealth knowingly used false statements during trial, or that the "false" testimony was relative to Stockton's guilt or innocence. At trial, Williams testified that he was a convicted felon and had been in the same cell as Stockton. Williams stated that Stockton had told him that he killed Ardner (App. 707-709). It was not until the pre-sentence hearing that the issue arose as to whether Williams had come forward voluntarily with the

evidence of statements Stockton had made. (App. 1072-74). Therefore, based on the foregoing, I find that whether or not Williams came forward with this evidence is a non-issue as pertains to grounds for granting habeas corpus relief.

D. Denial of New Trial in Light of Newly-Discovered Evidence

The fourth claim petitioner raises is that he is entitled to at least an evidentiary hearing in order to flush out evidence that Randy Bowman lied on the witness stand. Petitioner states that the only direct evidence that Ardner's killing was for hire was the testimony of Randy Bowman. At the hearing before this court petitioner submitted an affidavit by Frank Cox, dated July 26, 1984. Cox stated that he had been a cellmate of Bowman and Cox stated that Bowman had told him on several occassions that he had lied at Stockton's trial. Petitioner avers that he is aware of other sources that could corroborate Cox's affidavit. At trial Bowman testified that he was at the home of Tommy McBride when McBride stated that he needed to have the Ardner boy killed. (App. 694). Bowman testified that Stockton said he would do it because he needed the money. *Id.* Petitioner strongly argues that because Bowman was such a key witness that at the very least an evidentiary hearing should be held to dig out the whys and wherefores of Bowman's statements.

To obtain a new trial on the basis of after-discovered evidence, that evidence must be admissible in a new trial, *United States v. MacDonald*, 779 F.2d 962, 964 (4th Cir. 1985), and it must be clear that this evidence would have produced a different outcome. It is unlikely that hearsay

statements will be admissible and the type of evidence which would produce a different result. *Id. See Federal Rules of Civil Procedure,* Rules 803. In Virginia, the applicant bears the burden of establishing that the "evidence (1) appears to have been discovered after the trial; (2) could not have been secured for use at the trial in the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results at trial." *Odum v. Virginia,* 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983).

Generally, allegations of newly-discovered evidence are looked upon with disfavor by the courts. *United States v. McCoy,* 478 F.2d 846 (4th Cir. 1973); even if the evidence is a confession of another or the repudiation of testimony by a prosecution witness. *United States ex rel. Rice v. Vincent,* 491 F.2d 1326 (2nd Cir.) *cert. denied, Rise v. Vincent,* 419 U.S. 880 (1984).

In *Townsend v. Sain,* 372 U.S. 293, 317 (1963), the Court held, in part, that a federal habeas court must grant petitioner an evidentiary hearing if . . . there is a substantial allegation of newly discovered evidence. Where newly-discovered evidence is alleged, it must be evidence which petitioner could not reasonably have presented to the state trial court. "The evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly-discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Id.* "The duty to try the facts anew exists in every case in which the state court has not after a full hearing found the relevant facts." *Id.* at 318. *See* 28 U.S.C. § 2254(d). Where the state court has made

findings of fact on the issue of newly-discovered evidence, the federal habeas court has the duty to apply the applicable federal law to the state court's factual findings.

At the outset, it is to be noted that the information about the recantation of testimony by Bowman came to light through statements made by Bowman's cellmate. The witness himself has not come forward to recant his testimony nor has there been an offer of proof that he would do so. Petitioner merely states he knows of others who allegedly were told by Bowman that he had lied. Regardless of the availability or willingness of Bowman to testify, it is clear that this proffered testimony (that Bowman did not hear Stockton agree to kill Ardner for money) would not have changed the outcome of the trial. There was already testimony denying any meeting at McBride's house. Therefore, the information presented, as found by the Virginia Supreme Court, would be merely cumulative of other defense testimony. Additionally, petitioner had not proved, assuming that Bowman did lie at trial, that the Commonwealth knew about his false testimony and used it against Stockton anyway. I find petitioner has failed to meet the criteria for granting an evidentiary hearing on the claim of newly-discovered evidence and that he is not entitled to habeas corpus relief upon this claim.

E. Cumulative Effect of Errors Denied Fair Trial.

Finally, petitioner contends that even if he would not be entitled to relief on any individual claim, that the cumulative effect of the errors during his trial would

entitle him to relief. I find that this contention to be without merit.

II.

In conclusion, with the exception of the question of outside influence on the jury during their deliberation regarding Stockton's punishment and whether improper deliberations took place, I find that petitioner is not entitled to habeas corpus relief upon his remaining claims.

Accordingly, an Order shall be entered this day granting an evidentiary hearing on the claim in (a) pertaining to outside influence on the jury during its deliberation and on the issue of improper jury deliberation and dismissing the remaining claims in the petition.

ENTER: This 27th day of January, 1987.

/s/ Jackson L. Kiser
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

DENNIS WALDON STOCKTON, Petitioner	)	Civil Action No. 86-0106-D
v.	)	*ORDER*
COMMONWEALTH OF VIRGINIA, and EDWARD W. MURRAY, DIRECTOR, DEPARTMENT OF CORRECTIONS, Respondents	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby ADJUDGED and ORDERED that the petition for the habeas corpus relief shall be granted to the extent that the sentence shall be and hereby is vacated and Petitioner shall be given a new sentencing hearing or his sentence shall be reduced to life imprisonment.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTER this 18th day of June, 1987.

/s/ Jackson L. Kiser
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

DENNIS WALDON STOCKTON, Petitioner	Civil Action No. 86-0106-D
v.	*MEMORANDUM OPINION**
COMMONWEALTH OF VIRGINIA, and EDWARD W. MURRAY, DIRECTOR, DEPARTMENT OF CORRECTIONS, Respondents	By: Jackson L. Kiser, Judge United States District Court

Petitioner, Dennis Walton Stockton, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the constitutionality of the judgment of the Circuit Court of Patrick County entered upon jury verdicts rendered on March 23 and 24, 1983, convicting him of capital murder and fixing his punishment at death. The trial court entered final judgment and imposed the jury-recommended sentence on June 7, 1983.

After a careful review of the claims raised in the petition and Petitioner's state court record, this Court found that an evidentiary hearing should be held to investigate (1) the claim involving outside influence exerted on the jury during sentencing deliberations, and (2)

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*For continuity and clarity, this Opinion should be read in conjunction with this Court's Memorandum Opinion of January 27, 1987.

the possibility that improper juror deliberations may have occurred. As noted by this Court, the latter issue was not specifically raised by Petitioner, but was so closely related to the issue of outside influence on the jury's deliberations that further investigation was warranted. The other claims raised in the petition were dismissed.

I.

Pursuant to this Court's Order of February 19, 1987, counsel for Petitioner took the depositions of all twelve jurors who sat at Petitioner's criminal trial. Counsel for Respondents (Commonwealth) was present and cross-examined each juror. The transcript of each deposition was filed under seal to maintain confidentiality.

The evidentiary hearing was held on April 20, 1987. Petitioner presented two witnesses and Respondents called one witness. By agreement of counsel, testimony by each of the jurors was submitted in deposition form. Additionally, Petitioner submitted newspaper articles to support the claim that several jurors had read articles about the trial during the week of the trial.

The first witness called by Petitioner was James C. Blackard. Blackard testified that he and his wife had gone to the Owl Diner for lunch on the last day of the trial, and were seated in a booth across the aisle from a group of four jurors.[1] Blackard testified that Glenn Puckett, the owner of the Owl Diner, approached the jurors and started talking to them. Blackard heard Puckett ask the jurors how everything was going and said he heard a juror reply that "they'd all decided but one . . . that they

hadn't made a decision yet." (Tr. 5). Blackard stated that Puckett then said, "Well, I think they ought to fry the son-of-a-bitch." *Id.* According to Blackard, Puckett then remained at the table talking with the jurors for about five or ten minutes. Blackard was not able to hear what was being said. (Tr. 7, 16).[2]

Ginger Hall was then called by Petitioner. Hall was formerly married to Blackard and was his wife at the time of Stockton's criminal trial. Hall testified that she and her husband were in the Owl Diner having lunch and that she observed Puckett approach a table where some jurors were sitting.[3] She further testified that she heard Puckett ask how the trial was going and that one of the juror's replied, "We would have it wrapped up if it weren't for one damn woman." (Tr. 25). According to Hall, Puckett said, "I hope they fry the son-of-a-bitch," or "kill the son-of-a-bitch," or "it was something in that order." (Tr. 25, 34).

Respondents called Glen E. Puckett to testify about the incident. Although Puckett could generally recall being aware of Stockton's trial, he testified that he did not know the identity of the jurors hearing Stockton's trial and did not recall seeing any of the jurors in his restaurant during the week of Stockton's trial. (Tr. 39).[4] Puckett testified that he did not recall making the statement, "I hope they fry the son-of-a-bitch," but that "knowing me, I could have said it." (Tr. 40.)

The Court received excerpts from the jurors' depositions submitted by Petitioner and additional portions proffered by Respondents. The Court has noted the objections made by the parties to portions of the depositions

submitted into evidence. Because the depositions were placed under seal to ensure the integrity of the deliberative process and the confidentiality of each juror's testimony, specific reference to this testimony will not be made.

The testimony reflects that three of the male jurors went to the Owl Diner for lunch on the last day of the trial and sat together.[5] These jurors recalled Glen Puckett stopping by their table, however, only one juror recalled Puckett making some comment about the trial. The juror was unable to recollect to whom the comment was directed, but recalled that it was unfavorable to Stockton. Another juror indicated that he recalled general questions from the public and possibly from Puckett regarding when a verdict would be reached. The jurors were unable to recall whether one of them had made a comment to Puckett that one member of the jury was keeping them from finishing. These jurors denied discussing the case with Puckett and among themselves during lunch that day.

It appears that three female jurors were also having lunch together at the Owl Diner on the last day of the trial.[6] Of the three, one testified that Puckett asked her how the trial was going, but she told him she couldn't discuss the trial. One juror testified that some man had stopped by their table and said something "nasty" about Stockton, but could not recall what was said. She stated that she did not recognize the man. The other juror had no recollection of any comments being made to them about the trial.

The testimony of the jurors indicated that when they resumed deliberations none of the jurors mentioned any comments which had been made to any one of them by non-jurors during this lunch break. Nor did any of the jurors recall discussion during their deliberations about comments made by Mr. Puckett during lunch break. The testimony also indicates that at the time the jurors took their lunch break, at least one female juror was undecided about the punishment.[7]

Petitioner has also submitted testimony from some of the jurors indicating that comments had been made by members of the community throughout the trial, and that on two other instances, comments had been made to two jurors concerning opinions held by these two community members. Additionally, Petitioner has sought to support the claim of outside influence by resubmitting articles in local newspapers which appeared during the trial. These issues have been previously addressed by the Court and found irrelevant to the issues presently before this Court. Moreover, Petitioner conceded in oral argument that general questions by members of the public inquiring about the trial and when a verdict might be reached were not prejudicial to his right to trial by a fair and impartial jury. As stated earlier, the only issues facing this Court now concern (1) extra-judicial contact with jurors at the Owl Diner on the last day of the trial, and (2) possible improper jury deliberations outside the jury room. Therefore, the testimony of the jurors regarding their comments or contacts shall be disregarded. Nor will the Court consider the newspaper articles as evidence in determining whether Petitioner received a fair trial.

II.

The parties agree that the proper analytical framework to be applied to the first issue in this action is set forth in the case of *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532 (4th Cir. 1986). The Fourth Circuit Court of Appeals drew from principles established in two Supreme Court criminal cases[8] in articulating a three-part test to determine whether a defendant had been denied his constitutional right to a fair trial due to unauthorized third-party contact with jurors. Although the *Haley* case was a civil case involving a contract dispute, the Court noted that the test it was espousing was derived from *Remmer v. Unites States, supra,* and *Mattox v. United States, supra,* which were criminal cases.[9]

In *Haley,* a nonjuror had mistakenly been seated with the jury panel, was sworn with the jury, and remained with the other jurors during the first day of the trial. The mistake was discovered at the end of the first day and the nonjuror was excused. After the trial, defense counsel discovered that the nonjuror had made untoward remarks about the defendant in the presence of the entire jury. Counsel then presented to the court an affidavit of a juror to that effect together with a motion for a new trial. The District Court held a post-trial evidentiary hearing and concluded that the nonjuror's remarks were not prejudicial and denied the motion.

On appeal, the Fourth Circuit disagreed in part with the trial court's findings. The Fourth Circuit agreed with the trial court that pursuant to Rule 606(b) of the Federal Rules of Evidence,[10] the juror's testimony as to outside

influence was competent to impeach the verdict. But the Fourth Circuit did not agree with the trial court that the nonjuror's remarks were not prejudicial. In so holding, the Court set forth the correct method by which the district court should have analyzed the problem. The proper analysis is as follows:

First, a court must determine whether the jurors were in fact exposed to any extra-judicial contacts during the trial. Second, if exposure is found, the court must presume that the contacts were "prejudicial" unless it finds that the contacts were clearly "innocuous." *Haley v. Blue Ridge Transfer Co., supra,* at 1536, 1537, n. 9. Third, a court must determine whether the party supporting the verdict has rebutted the presumption of prejudice. This burden of rebuttal rests *heavily* on the party supporting the verdict. *Id.* at 1535. (Emphasis added). In determining whether the party supporting the verdict has carried his burden of rebutting the presumption that jury communication was prejudicial, the court must decide whether there remains a "reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." *Id.* at 1538. If there remains a "reasonable possibility," the Court must order a new trial."[11]

Before analyzing the evidence under *Haley,* it is well to emphasize that provisions Rule 606(b) of the Federal Rules of Evidence prohibits the testimony of a juror as to the deliberative process for the purpose of impeaching the jury's verdict. However, it does not prohibit a juror's testimony with regard to outside influences to which a juror has been exposed. Nor does the Rule in any way inhibit the consideration of a nonjuror testimony. Thus, this Court may consider the testimony of witnesses

Blackard, Hall and Puckett and the testimony of the jurors as to any outside influences which may have been brought to bear on a juror or jurors. But this Court cannot consider juror testimony as to what effect, if any, the outside influence had upon the juror's mental processes or upon the jury deliberations. With this in mind, the Court now turns to a consideration of the facts under the *Haley* guidelines.

The testimony of Blackard and Hall clearly shows that some of the jurors were contacted by Puckett. Their testimony is corroborated by some of the juror testimony as well as that of Puckett. Moreover, their testimony and the corroboration leave little doubt that the matter discussed by Puckett was the focus of the jury's deliberations, i.e., whether to impose a life or death sentence upon Stockton. And it is just as clear that Puckett's comments were not "innocuous." Indeed, a comment could be no more pointed that "I hope you fry the son-of-a-bitch."[12] Even the milder characterization of Puckett's comments as being "nasty" or "unfavorable to Stockton" would not permit a finding of beingn "clearly innocuous." Thus the Court finds that the first two elements of the *Haley* test have been met, i.e., outside contact was made with one or more of the jurors and that the statements made were not innocuous. These findings give rise to the presumption that the outside statements were prejudicial to Stockton and require the Court to determine whether the Commonwealth has rebutted it.

Before considering whether the Commonwealth has rebutted the presumption of prejudice, the Court must consider the Commonwealth's argument that Stockton

had a chance to present such evidence as he found necessary during the state court post-trial evidentiary hearing and that this Court is bound by the findings made by the trial court on that evidence. This Court has previously ruled that Stockton was denied a full, fair, and adequate hearing and, therefore, the presumption of correctness would not attach to any findings regarding the issue of Puckett's comments. 28 U.S.C.§ 2254(d). In any event, the Court is of the opinion that the Commonwealth's argument is flawed in two respects. First, the trial court did not make findings as to the issue of Puckett's comments to the jurors at the Owl Diner. This issue was not specifically addressed when the ruling was made. (App. 1038-39). Second, a finding of prejudice is a question of law, not of fact, and, therefore, not entitled to the presumption of correctness. The underlying facts on which such a finding might be predicated, if found by the trial court, would be entitled to the presumption of correctness, but the ultimate legal question of prejudice is not.

The Court now must determine whether the Commonwealth has offered sufficient evidence to rebut the presumption of prejudice. As noted previously, Rule 606(b) prohibits the Court from considering testimony of a juror as to what effect, if any, the extraneous comment had upon him or the deliberations.[13] The Commonwealth argues that the source, nature, and context of the comments rebut any prejudicial effect the comments could have had on the jury. It contends that the evidence and the rational inferences which may be drawn from that evidence rebut the presumption of prejudice.

First, the Commonwealth contends that because the comment was not made by a court official or an authority

figure within the court system, it would have little effect upon the jurors who heard it. Additionally, it emphasizes the testimony of one juror who knew Puckett and held him in low esteem. Second, it contends that the exact wording of the comment was unclear, and that the comment was merely an off-hand personal opinion which was not directed towards any juror and was not coercive or directory in nature. Finally, it contends that the objective evidence regarding the effect of the statement on the jurors shows that neither the jurors nor their deliberations were affected by the comment. The Commonwealth points to testimony by the jurors that indicated that only two of the jurors remembered hearing any untoward comment. It also argues that it is highly significant that no discussion of the "fry the son-of-a-bitch" remark occurred in the jury room.

Upon consideration of the Commonwealth's evidence, the Court is of the opinion that it has failed to rebut the presumption that Puckett's comments to the jurors prejudicially affected the juror's decision concerning Stockton's punishment. First, the Court finds that the "source" of the comments under the circumstances is not dispositive of the question of the probable prejudicial effect of the comments upon the jurors. While the source of an unauthorized communication is a factor to be considered when determining the probable effect of such communication, it is not the most important factor. In *Parker v. Gladden*, 385 U.S. 363, 365 (1966), the Court found it significant that it was the bailiff in charge of shepherding the sequestered jury who made the unauthorized, prejudicial comment. However, the Court found more significant the fact that some jurors had been

exposed to an unauthorized comment. The Court indicated that it was not the actual number of jurors who heard the comments that was important; instead, it was the fact that a comment had been made and overheard. The Court reasonsed that the criminal defendant is "entitled to be tried by 12, not 9 or 10, impartial and unprejudiced jurors." *Id.* at 366. It follows that unauthorized, prejudicial contact by any third party with even one juror would be sufficient to find denial of the right to trial by an impartial jury. Therefore, neither the source of the comment nor the actual number of jurors who heard the comment are determinative factors in themselves in assessing the probable effect of the comments on the jury.

In *Near v. Cummingham,* 313 F.2d 929 (4th Cir. 1963), the court was faced with a mixed question of fact and law concerning the issue of whether statements had been made by spectators on the courthouse lawn to jurors and whether the jurors had heard the statements. The comments allegedly made by the spectators to the jurors during a recess concerned the proper punishment of the defendant. The case was remanded to the district court for a hearing to determine whether the comments had been in fact made. The clear implication being that comments from spectators would constitute prejudicial outside influence. Because the nature and circumstances of *Near* and the case *sub judice* are very similar, it is persuasive authority against the Commonwealth's "source" argument.

The Court cannot reasonably infer from the circumstances of this case that the jurors who heard Puckett's comments ignored him or his comments. Although Puckett was not a court official, he was a rather prominent

local figure, and made his presence known to the patrons in this restaurant by talking with them. Testimony which indicated that Puckett was not highly regarded in the community was given by a juror who did not hear Puckett make the comments. Whatever Puckett's reputation in the community was, it was not known to most of the jurors. Of the jurors who knew Puckett, their acquaintance came from the fact that he was the owner of the Owl Diner. It could reasonably be inferred that as owner of a local diner, Puckett would be a good "source" of local information. The Court does not consider the Commonwealth's argument concerning the "source of the comments" sufficient to rebut the presumption that the comments prejudicially affected the jurors who heard them.

Second, the Commonwealth has not shown that the comment, although "highly untoward," was one which the jurors would have rationally disregarded as having no bearing upon any matter before them. The Commonwealth's burden in this instance is especially heavy because the comment pertained to Stockton's punishment and, therefore, concerned precisely that matter which was before the jury on that day. The Commonwealth has sought to distinguish the nature and context of Puckett's comment from other cases involving unauthorized, extrajudicial contact with jurors,[14] but has offered no positive evidence to rebut the presumption. As stated above, the nature of the remark was adverse to Stockton, and the context in which the remark was made was such that it is reasonable to infer that it would stick in the minds of the jurors who heard it when they resumed their sentencing deliberations.

Third, the Commonwealth points out and the Court notes that no juror indicated that Puckett's comments were brought up during the deliberations. From this, it would have the Court infer that whatever comments were made by Puckett had no effect on the jurors' deliberations. The point is well-taken. However, the fact that the juror did not discuss Puckett's comments in the jury room does not satisfy the Commonwealth's burden of rebutting the presumption that the remark had the probable effect of prejudicially affecting the personal thinking or deliberations of the individual jurors who heard the remark. This fact does not satisfy the heavy burden of the Commonwealth to rebut the presumption of prejudice arising from that the fact that some jurors heard some untoward comment against Stockton on the very day they were deliberating his punishment.

After a careful review of the evidence put forth by the Commonwealth, as well as the remaining admissible record evidence, the Court finds that there remains a "reasonable possibility" that Puckett's comments prejudiced the jury's sentencing deliberations. The comments were prejudicial in nature, they were heard by at least two jurors, and they concerned the matter squarely before the jury on that particular day. The Court cannot assume that the jurors were not influenced by them. Thus, the Court finds that Petitioner has shown that it was unlikely that he received a fair trial with respect to the sentencing phase. This amounts to a denial of the constitutional right to a fair trial by impartial jurors at the sentencing stage. Therefore, Petitioner's sentence must be vacated and a resentencing hearing must be held in the

state court[15] or Stockton's sentence reduced to life imprisonment.

III.

The second issue before the Court concerns the allegations that improper jury deliberations occurred during the trial thereby denying Stockton's constitutional right to a fair trial. The Commonwealth strongly objected to the Court's consideration of this claim on the ground that it has never been raised on appeal or in the petition for a writ of habeas corpus, and contended that consideration of this issue is barred. Stockton concedes that he has not before raised a claim denoted "improper jury deliberations", but contends that he has raised state court claims that relate to this Sixth Amendment right to a fair trial before impartial jury. The Court allowed further investigation into this issue upon finding that it was closely related to the Sixth Amendment claim raised in the petition regarding the failure to sequester the jury. For purposes of this opinion, the Court will consider the issue to be properly before it.

To determine whether or not juror misconduct has prejudiced the defendant to the extent that he has not received a fair trial, the Court will consider excerpts from the juror depositions. *See United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1970) (not every instance of juror misconduct requires a new trial). Because testimony concerning the deliberations within the jury room is inadmissable to impeach the verdict, the testimony shall be considered only as it pertains to possible juror misconduct which took place outside the jury room.

Upon review of the juror despositions, the Court finds that the only evidence presented regarding improper deliberations was the conversation of the three jurors who sometimes shared a ride to and from the trial. Basically, their conversation went to the manner in which the trial was being conducted rather than substantive matters of guilt and innocence. This discussion does not appear to have been in violation of the Judge's cautionary instruction. There also was testimony by another juror who indicated that there had been a discussion about a lack of evidence. It was unclear when this discussion took place, but it appeared very likely that it occurred prior to the actual seating of the jurors. None of the other jurors recalled this incident, nor did any of the jurors recall discussing the case at the Owl Diner. The only other significant testimony is that three of the jurors may have commented to each other about the appearance of some witnesses, specifically, that some of the witnesses looked like rough characters. Under the circumstances, this comment was not harmful in light of the fact that many of the witnesses at Stockton's trial had criminal records.

Blackard testified at the hearing that he observed jurors talking among themselves, but did not hear what they were saying. Blackard testified, however, that he knew the jurors present at the Owl Diner were discussing the trial because "why else would somebody get down and whisper." (App. 1030-31). This, of course, is nothing more than an unwarranted assumption and cannot be considered. Hall testified that she did not know if the jurors had talked or not, and she did not hear anything that the jurors said among themselves at the Owl Diner. (Tr. 4/20/87, p. 26).

Based on the evidence presented, the Court finds that Stockton has failed to show that improper deliberations outside the jury room occurred or that the discussions were prejudicial. The most that is shown by the evidence is that some of the jurors may have ignored the trial court's cautionary instruction and discussed matters relating to the trial yet not pertaining to Stockton's guilty or innocence. Therefore, the Court concludes that the evidence fails to rise to a level of constitutional significance.

IV.

In conclusion, the Court finds that there remains a reasonable possibility that Puckett's comments to the jurors at the Owl Diner may have prejudicially affected the juror's decision regarding Stockton's punishment. Consequently, the Court finds that Stockton's sentence is constitutionally infirm and that he is entitled to a resentencing hearing or to a reduction in sentence from death to life imprisonment. Stockton is not entitled to habeas corpus or other relief upon his claim of improper deliberations.

An appropriate Order shall be entered this day in accordance with this Opinion.

The Clerk is directed to send a certified copy of this Memorandum Opinion to all counsel of record.

/s/ Jackson L. Kiser
United States District Judge

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[1] Blackard testified that he recognized the jurors because he had been subpoenaed to the trial and had seen the jury

selection. Blackard was unsure whether the jurors were already seated and whether the four jurors were all males. (Tr. 5-6, 10,15).

[2] On cross-examination, Blackard testified that he had been subpoenaed on behalf of Stockton, but not called to testify during the trial. Blackard did, however, testify at the post-trial evidentiary hearing regarding the Owl Diner incident. Blackard further admitted to having been convicted of several felonies and misdemeanors. (Tr. 17).

[3] Hall was unable to recall whether there were three or four jurors sitting together, but she stated that the jurors were males. (Tr. 36). Hall also was unable to recall where in relation to the table of jurors she and Blackard were sitting.

[4] Counsel for Respondent named the jurors and asked whether Puckett knew them and had seen any of them in his diner during the trial. Puckett recognized some of the jurors' names, but did not recall seeing any of them in his restaurant during the week of Stockton's trial.

[5] The jury was deliberating the appropriate punishment for Stockton on the last day of the trial, Thursday, March 24, 1983.

[6] The three female jurors were seated at a table in a separate room from the booth at which the three male jurors were sitting.

[7] As noted by Petitioner, it would have been impossible for James Blackard and Ginger Blackard Hall to have known this. Petitioner points to Hall's testimony concerning the statement she heard one of the juror's make that they had all decided except for "one damn woman" while she and Mr. Blackard were at the Owl Diner.

[8] *Remmer v. United States*, 347 U.S. 227 (1954) and *Mattox v. United States*, 146 U.S. 140 (1892).

[9] *Haley v. Blue Ridge Transfer Co.*, 802 F.2d at 1535.

[10] Rule 606(b), Federal Rules of Evidence, provides inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything

upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received from these purposes.

[11] *Id.* at 1537, n. 11, where the Fourth Circuit states that "[a] trial court facing this type of new trial motion can only consider all of the competent evidence objectively in light of common experience, and exercise its reasoned discretion, which is somewhat narrowed under these circumstances."

[12] The Commonwealth argues that a single off-hand comment such as this is insufficient to establish a presumption of prejudice, but this argument is in conflict with *Remmer v. United States* at 229 which states a court must presume contacts are prejudicial if they relate to "the matter pending before the jury."

[13] At the hearing before the trial court, the jury foreman testified that the statement had no affect on him. This testimony was presented by the Commonwealth and not objected to by Stockton; therefore, any evidentiary objection was waived and the trial court could properly consider it. Because it was proper evidence in the state court and is a part of the record, this Court can consider it.

[14] Commonwealth cites *Wiedemann v. Galiano*, 722 F.2d 335 (7th Cir. 1983) (a case involving an extra-judicial remark which injected additional evidence in the proceedings), *Remmer v. United States, supra,* and *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984) (cases involving jurors being offered bribes or being threatened) to distinguish the instant set of facts.

[15] Under Virginia criminal procedure, capital trials are bifurcated. The court first submits to the jury the issue of guilty or innocence. If the jury finds the defendant guilty as charged in the indictment, a separate proceeding must then be held on the issue of the penalty. The law further provides that

if the sentence of death is set aside or found invalid, the court shall impanel a different jury on the issue of the penalty at the request of the defendant or the Commonwealth. Va. Code § 19.2-264.3 A., C., and § 19.2-264.4 (1983 Repl. Vol.).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-4002(L)

DENNIS WALDON STOCKTON,

Petitioner - Appellee,

versus

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, DIRECTOR,
Virginia Department of Corrections,

Respondents - Appellants.

No. 87-403

DENNIS WALDON STOCKTON,

Petitioner - Appellant,

versus

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, Director,
Virginia Department of Corrections,

Respondents - Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, District Judge. (CA-86-106-D).

Argued: February 1, 1988 Decided: July 22, 1988

Before WIDENER, ERVIN, and WILKINSON, Circuit Judges.

Frank Snead Ferguson, Assistant Attorney General (Mary Sue Terry, Attorney General; Virginia B. Theisen, Assistant Attorney General on brief) for Appellant; Louis Martin Bograd (Donald G. Frankel; Kevin S. Marks; Joseph G. Poluka; Pamela K. Chen; Arnold & Porter on brief) for Appellees.

WILKINSON, Circuit Judge:

Dennis Stockton was tried before a jury in the Circuit Court of Patrick County, Virginia, for the murder fof hire of Kenneth Arnder. The guilt phase of Stockton's trial lasted for two days and, on March 23, 1983, the jury found him guilty of capital murder. The sentencing phase of the trial took place the following day. The jury recommended that Stockton be sentenced to death.

Stockton petitioned for federal habeas relief pursuant to 28 U.S.C. § 2254, seeking to have his death sentence vacated and his conviction overturned. He contends that his sentence was tainted by prejudicial comments made to the jurors during their deliberations. While several members of the jury lunched at the Owl Diner on the day they deliberated Stockton's sentence, the proprietor of the diner appproached the jurors and told them, among other things, that "they ought to fry the son of a bitch." We think such communications denied Stockton his right

to a fair and impartial jury during the sentencing deliberations. We thereform affirm the district court's judgment vacating Stockton's death sentence. The state shall have the choice of either reducing his sentence to one of life imprisonment or sentencing him anew.

Stockton also claims that he was denied a fair trial on several grounds, including other extrajudicial contacts with jurors during the guilt phase of his trial, the admission of testimony describing his commission of a second murder, improper jury deliberations, and prosecutorial misconduct. We hold that Stockton was not denied a fair trial in the guilt phase of the proceedings, and we affirm the judgment of the district court denying habeas relief on his conviction.

I.

On July 25, 1978, the body of eighteen year old Kenneth Arnder was discovered in a remote area of Surry County, North Carolina. Arnder had been shot in the head and both of his hands had been severed at the wrists. The parties stipulated that the cause of death was either the wound to the head, the severing of the hands, or both.

Stockton was arrested for Arnder's murder on June 25, 1982, in Patrick County, Virginia, a small county in southside Virginia with a population of less than 20,000 people. He was tried in the Circuit Court of Patrick County on March 21 to 24, 1983. His arrest and trial generated considerable local publicity. The print and broadcast media featured reports of the trial and pretrial

proceedings as well as accounts of investigations connecting Stockton to several local murders, the discovery of the victims' bodies, and Stockton's past criminal history. In one newspaper article, Stockton was labeled "Surry County's public enemy number one" and compared to Charles Manson.

The evidence presented against Stockton at his trial was substantial. Randy Bowman testified that he, Stockton, Ronnie Tate, "Sunshine" Hatcher, and Diane and Tommy McBride were at McBride's home in June of 1978 when Tommy McBride offered Bowman $1,500 to kill the "Arnder boy," who had offended McBride in a drug deal. Stockton offered to do the job because he needed to make money. Stockton and McBride then went into another room together.

Arnder's mother testified that she last saw her son alive on July 20, 1978. That evening Arnder left his mother's home with Stockton to camp out in a picnic area in Patrick County to avoid difficulties arising from his involvement with some stolen property. Arnder's body was found five days later. Further evidence at trial included Robert Gates' testimony that in July of 1979 he witnessed Stockton shoot and kill Ronnie Tate for "running his mouth" about the Arnder killing. There was also testimony that on several occasions Stockton had admitted to killing Arnder.

On March 23, 1983, the jury found Stockton guilty of the murder for hire of Kenneth Arnder. On the following day, pursuant to Virginia's bifurcated trial procedure for capital crimes, the jury fixed Stockton's sentence.

During the sentencing deliberations, the jury broke for lunch. At least two groups of jurors, one group of three women and another of three or four men, ate at the Owl Diner, a restaurant near the courthouse. The atmosphere at the diner was a casual one. One juror recognized two court deputies at a nearby table and James Blackard, a witness subpoenaed to testify at the trial, was seated with his wife in a booth across the aisle from a group of male jurors. The Blackards testified that Glenn Puckett, the owner of the Owl Diner, approached the jurors and inquired whether they had reached a decision yet. One of the men replied that they had all decided except for "one damned woman." Puckett then commented to the jurors that he thought "they ought to fry the son of a bitch." According to the Blackards, Puckett remained and conversed with the jurors for several minutes.

The jurors resumed sentencing deliberations after the lunch break. They concluded that Stockton was likely to "commit criminal acts of violence that would constitute a continuing serious threat to society" and that his conduct was "outrageously or wantonly vile, horrible, or inhuman" and fixed his sentence at death.

The trial court held a post-conviction hearing on June 7, 1983. At the hearing, the court took testimony concerning the Owl Diner incident. The court concluded from the evidence presented that Puckett had asked members of the jury whether they had reached a decision, but that Stockton had suffered no prejudice as a result of that query. The court also indicated that something else may have been said but that the witnesses did not know what it was. The court then entered final judgment against Stockton and imposed the death sentence.

Stockton perfected a direct appeal of his conviction to the Supreme Court of Virginia. The conviction and sentence were affirmed. *Stockton v. Commonwealth*, 314 S.E. 2d 371 (Va. 1984). Certiorari was denied by the United States Supreme Court. *Stockton v. Virginia*, 469 U.S. 873 (1984).

After some further state proceedings, Stockton's execution was scheduled for October 3, 1986. Stockton petitioned the United States District Court for the Western District of Virginia for a stay of execution and federal habeas corpus relief. The stay was granted on October 2, 1986. A hearing was then held on the habeas petition, and on June 18, 1987, the district court granted Stockton a writ of habeas corpus vacating his death sentence and granting him a new sentencing hearing or a reduction of his sentence to life imprisonment. The Commonwealth appeals and Stockton cross appeals the district court's denial of relief with respect to his conviction.

II.

Glenn Puckett approached a group of jurors while they lunched at the Owl Diner on the day they deliberated Stockton's sentence. After inquiring about the progress of their deliberations, Puckett told the jurors that he thought "they ought to fry the son of a bitch." The import of this comment is the primary issue in this case.[1]

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[1] The Commonwealth argues that Stockton is procedurally barred from raising in his federal habeas proceeding the claim that he was denied a fair trial by an impartial jury as a result of the Owl Diner incident. *See Wainwright v. Sykes*, 433 U.S. 72

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A.

The Commonwealth argues that the defendant bears the burden of establishing that unauthorized third party communications with members of the jury resulted in actual juror partiality. It is true that the defendant must

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(1977). We disagree. although the issue was not framed with the precision that one would prefer, Stockton's briefs to the Virginia Supreme Court raised the question of jury impartiality in light of Puckett's comments to the jurors in the Owl Diner and the general emotionalism that surrounded his trial. In addressing the trial court's refusal to grant a change of venue, Stockton argued in his briefs:

> A witness testified that the foreman and two other jurors were at the Owl Diner having lunch and he heard the owner discussing the case briefly with those jurors. According to the witness, the restaurant owner had said to the foreman that he hoped "they fry that son of a bitch." . . . So now we must wonder: was the verdict the product of the quiet, cool impartiality of jurors who truly stood "indifferent" to the cause, or is the verdict tainted by all the above factors? . . . The fact that twelve good men and women may have *tried* their best to give the defendant a fair and impartial trial is of no moment. The queston is whether they stood "indifferent to the cause" or impartial as a deliberative body. It would ignore human nature an common sense not to be seriously and gravely concerned about the impartiality of the jury that convicted Stockton.

Stockton's briefs "fairly presented" his constitutional claim of juror partiality to the Virginia Supreme Court giving the state courts "a fair opportunity to consider . . . [that] claim and to correct [the] asserted constitutional defect." *See Picard v. Connor*, 404 U.S. 270, 276-77 (1971). In sum, we do not believe that Stockton's claim is procedurally barred on federal habeas by virtue of a failure to raise it before the Virginia Supreme Court.

first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict. Once such a contact has been established, however, the government bears the burden of demonstrating the absence of prejudice.

The Sixth Amendment guarantees a criminal defendant the right to trial by an impartial jury. No right touches more the heart of fairness in a trial. The fact that there was here no threat or inducement, no invasion of the sanctity of jury room deliberations, does not still the sense that something went awry. The Supreme Court has long recognized the dangers to impartiality posed by unauthorized communications between third parties and members of the jury. Almost a century ago the Court declared that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 150 (1892). In *Remmer v. United States*, 347 U.S. 227 (1954), the Court reinforced the rule set forth in *Mattox:*

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229.

The rules of evidence make it difficult for either party to offer direct proof of the impact that an improper contact may have had on the deliberations of the jury. *See* Fed. R. Evid. 606(b); *Mattox*, 146 U.S. at 149 (quoting *Woodward v. Leavitt*, 107 Mass. 453 (1871)) ("the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict"). The right to an impartial jury belongs to the defendant, however; thus a rebuttable presumption of prejudice attaches to the impermissible communication. While juror testimony concerning the effect of the outside communication on the minds of the jurors is inadmissible, the state may rebut the presumption of prejudice through whatever circumstantial evidence is available, including juror testimony on the facts and circumstances surrounding the extraneous communication. This circuit has held in the civil context that the party supporting the jury's verdict must overcome the rebuttable presumption of prejudice that attaches once an impermissible contact with the jury has been established. *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-37 (4th Cir. 1986). If this was true in the civil context, it would appear no less applicable to a criminal trial.

We cannot accept the Commonwealth's argument that the presumption of prejudice attaching to extrajudicial communications was overturned by the Supreme Court in *Tanner v. United States*, 107 S.Ct. 2739 (1987) or *Smith v. Phillips*, 455 U.S. 209 (1982). Neither of those cases dealt with the question at issue here -- the effect of a third party communication to the jury about the case. In *Tanner*, the Court held that juror testimony concerning drug and alcohol use by members of the jury during the

trial was inadmissible in a post-verdict evidentiary hearing under Rule 606(b) of the Federal Rules of Evidence and was not required by the Sixth Amendment. *Tanner*, 107 S.Ct. at 2750-51. The defendant's Sixth Amendment right to a competent and unimpaired jury was held to be amply protected by the opportunity to examine a juror's suitability during voir dire and to introduce non-juror evidence of juror misconduct and impairment in a post-verdict evidentiary hearing. *Id.* at 2751.

In *Phillips*, the Court declined to impute bias to a juror who, during the course of trial, applied for employment as investigator with the district attorney's office. The Court again noted that the beliefs, biases, and preferences of every juror may be explored and exposed by the defendant at voir dire. Further, when some external manifestation of a juror's predisposition subsequently calls the juror's impartiality into question, the defendant is afforded the opportunity to establish the juror's actual bias. *Id.* at 215-17. Where, however, the danger is not one of juror impairment or predisposition, but rather the effect of an extraneous communication upon the deliberative process of the jury, the defendant's right to an impartial jury requires that the government bear the burden of establishing the nonprejudicial character of the contact. *See, e.g., Haley*, 802 F.2d at 1535-36 and n.5 (civil case); *United States v. Butler*, 822 F.2d 1191, 1195-96 and n.2 (D.C. Cir. 1987); *United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985). *But see United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

Although neither *Tanner* nor *Phillips* dealt directly with extraneous communications to members of the jury, those cases are nonetheless instructive in any situation

where a jury verdict is being impeached. The benefits of ensuring the finality of the jury's verdict and avoiding needless harassment of jurors by the losing party are relevant in all such cases. *See Tanner,* 107 S.Ct. at 2749-50. Thus, jury verdicts are not to be lightly cast aside. Our system of criminal justice rests in large measure upon a confidence in conscientious juror deliberations and juror attentiveness, both to the evidence at trial and to the instructions of the trial judge. This confidence is not to be displaced every time a third party communication reaches the ears of a juror during trial. *See id.* at 2747-48; *Phillips,* 455 U.S. at 209. Thus, while a presumption of prejudice attaches to an impermissible communication, the presumption is not one to be casually invoked.

When this sequence of proof involves fact-finding by the state courts, those determinations must be afforded further deference in federal habeas proceedings. *Sumner v. Mata,* 449 U.S. 539, 550 (1981). Testimony on the Owl Diner incident was taken by the state trial court in a post-conviction hearing. Unfortunately, the trial court failed to make a factual finding on the critical questions presented here: whether Puckett commented to the jurors that "they ought to fry the son of a bitch" and, if so, whether that juror contact was prejudicial. Since "the merits of the factual dispute were not resolved in the state hearings," the federal habeas court properly held an evidentiary hearing on the question. *Townsend v. Sain,* 372 U.S. 293, 313-16 (1963); 28 U.S.C. § 2253(d)(1).[2]

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[2] In the state trial court hearing James Blackard testified that Glenn Puckett "came up and asked [the group of jurors] if they had come to a verdict yet . . . . And then Glen Puckett says

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something to the effect, said I hope they fry that son-of-a-bitch." Ginger Blackard testified that "Glen Puckett, the owner of the diner came up and was talking to them about the trial. He wanted to know if they had reached a verdict, and one of them . . . said that all of them had decided except for one woman." On cross-examination, she stated that Puckett "sat down and talked to them but I wasn't paying any attention to what they were talking about." The jury foreman, Gary Cockram, also testified at the hearing. He testified that "[o]ther than the comment of are you about to reach a decision . . . no other discussion that I recall took place concerning the case."

After hearing this testimony the trial court stated:

> If I understand Mr. and Mrs. Blackard's statement as to what they heard was said, was that this Mr. Puckett asked if they had reached a decision and some comment was made they had all decided but one woman. I feel that statement in itself is not prejudicial, not harmful and Mr. Puckett says they didn't discuss anything further. Mr. and Mrs. Blackard seem to suspect that maybe (Con't) something else was said but they don't know what was said. So, based upon that, I see no harm or prejudice in the statement that was made and I'll overrule the motion.

Two things concern us regarding the trial court's conclusions. Contrary to the trial court's statement, Puckett had not testified at the state post-trial hearing. Secondly, James Blackard's testimony specifically mentioned the offending comment, but the trial court did not address it in its holding. We obviously do not require state factfinding to address all the minutiae of defendants' claims, but it is not unrealistic to expect more than an ambiguous response to contentions of this consequence. We therefore agree with the district court that "the trial court did not make findings as to the issue of Puckett's comments to the jurors at the Owl Diner. This issue was not specifically addressed when the ruling was made."

B.

We agree with the district court that Puckett's comment posed a potential for prejudice that was too serious to ignore.

We note at the outset that Puckett did not deny making the offending remark. In fact, he testified before the district court that "knowing me, I could have said it." Excerpts from juror depositions and the testimony of James Blackard and Ginger [Blackard] Hall, who overheard the conversation, were also received by the court.

Based upon this evidence the district court found that

> [t]he testimony of Blackard and Hall clearly shows that some of the jurors were contacted by Puckett. Their testimony is corroborated by some of the juror testimony as well as that of Puckett. Moreover, their testimony and the corroboration leave little doubt that the matter discussed by Puckett was the focus of the jury's deliberations, i.e., whether to impose a life or death sentence upon Stockton.

The district court further concluded that "it is just as clear that Puckett's comments were not 'innocuous.' Indeed, a comment could be no more pointed tha[n] 'I hope you fry the son-of-a-bitch.' Even the milder characterization of Puckett's comments as being 'nasty' or 'unfavorable to Stockton' would not permit a finding of being 'clearly innocuous.'" These findings are amply supported by the evidence.

The circumstances surrounding Puckett's comments do not, as the Commonwealth suggests, rebut the presumption of prejudice that attaches to this contact. This was no mere offhand comment. Puckett knew that he was

addressing his opinion to members of the jury -- his comment about what should happen to Stockton was preceded by an inquiry as to whether the jurors had reached a decision. Further, the comment bore on the exact issue -- whether to impose the death penalty -- that the jurors were deliberating at that time. Puckett's comment was then followed by several minutes of conversation between Puckett and the jurors, the subject of which is unknown. While the Commonwealth disputes the district court's characterization of Puckett as "a rather prominent local figure," it is not unfair to assume that a local restaurant owner was a source or barometer of local sentiment. The fact that Puckett's comment was not mentioned in jury deliberations does not persuade us that it had no prejudicial impact upon the jurors' minds. Indeed, two jurors still remembered the essence of the Owl Diner incident four years after it occurred.

Emotional environments require that the deliberateness of jury decisionmaking be preserved. Stockton's trial generated intense publicity and interest within this small community. The details of the murder of which he stood accused understandably occasioned outrage. The casualness with which the trial was conducted stands in sharp contrast to this charged milieu. We do not hold that the trial court abused its discretion in refusing to grant a change in venue or to sequester the jury. *Stockton*, 314 S.E. 2d at 380. We are troubled, however, by the trial court's failure to take more modest steps to protect the jurors from community sentiment. Throughout the brief trial and sentencing deliberations, jurors were simply released for lunch. They dined in small groups in restaurants near the courthouse frequented by the attorneys, witnesses,

and court personnel. Contrast *Andrews v. Shulsen*, 600 F. Supp. 408, 419 (C.D. Utah 1984) (jurors kept together and away from others and provided a separate dining room). They were approached by interested citizens curious about the progress of their deliberations. Although many jurors attempted dutifully to ignore expressions of public opinion and to avoid commenting on the case, they were powerless to avoid contact with the public. As a result they were exposed to the type of pointed and prejudicial suggestion whose utterance encourages the all too human tendence to pursue the popular course.

III.

Stockton challenges the validity of his underlying conviction on several grounds. We find no violation of Stockton's rights with regard to the guilt phase of his trial. We thus affirm the district court's denial of habeas relief with respect to the jury's verdict that Stockton was guilty of murder for hire.

A.

Stockton argues that his conviction should have been reversed because the juror depositions ordered by the district court indicate that there were extrajudicial contacts with members of the jury during the course of the trial. We reject this contention for two reasons.

First, unlike the Owl Diner incident, no mention of these additional jury contacts was ever made at any stage of the state court proceedings. Although Stockton claims he learned of these contacts for the first time as a result of

juror depositions conducted in federal court, he has failed to demonstrate sufficient cause for not attempting to pursue in state court a line of inquiry that surely was suggested by his claim of jury partiality as a result of the denial of his motions for sequestration of the jury and a change of venue. Raising stale claims for the first time in federal court is precisely what the Supreme Court has warned litigants to avoid. *Murray v. Carrier,* 106 S. Ct. 2639 (1986); *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977) (criminal trial and sentencing in state court is the "decisive and portentous event").

Secondly, reversal is not required anytime a juror hears anything at all about a case. Even the most scrupulous jurors may not be able to avoid overhearing all comment on a trial. Jurors are not rendered "partial" simply because they become aware of the existence of negative community sentiment. "The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips,* 455 U.S. at 217. However, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Id.*

The other alleged contacts differed markedly from the Owl Diner incident. While some of the jurors had the general impression that public sentiment disfavored the defendant, their recollection of specific instances of third party communications was vague. Juror Bowman recalled a neighbor telling her, "You probably know what I think,

but I can't tell you." She testified that strangers occasionally commented that they thought Stockton was guilty. She "figured . . . that most people were in favor of the death penalty," but she properly excused herself when people began to discuss the trial. Juror Hughes testified that "people naturally think 'well he shot this man in the head and cut his hands off, you're going to put the noose around his neck, right?'" When asked if anyone told him that Stockton should be given the death penalty, Hughes responded, "No, sure didn't."

As noted above, Stockton bears the initial burden of establishing both that the extrajudicial contacts occurred and that they were of such a nature as to reasonably cast doubt on the validity of the jury's verdict. *See Haley*, 802 F.2d at 1537 and n.9. Stockton has failed to carry his burden in that regard. Other than the Owl Diner incident, there is no clear evidence of instances in which so pointed an expression of community displeasure was communicated directly to members of the jury. We are satisfied from the nature and context of these contacts that they were indeed innocuous and did not prejudice the jury's deliberation of Stockton's guilt or render that phase of his trial unfair.

B.

We likewise find no merit to Stockton's claim that his right to a fair trial was violated by improper deliberations by subgroups of jurors. The district court found, and the record reveals, that the only evidence relating to charges of improper deliberations concerned conversations between three jurors who shared a ride to and from the

courthouse. These conversations consisted in part of small talk about the manner in which the trial was being conducted and the appearance of certain witnesses. The question of defendant's guilt or innocence was not discussed. It is certainly permissible for jurors to carpool to and from court without giving rise to a question of subset deliberations. It may also be unrealistic to think that jurors will never comment to each other on any matter related to a trial. Even if these conversations violated the trial court's instructions to the jurors not to discuss matters relating to the trial, there is not evidence that the merits of the case were deliberated. There was thus no prejudice to the defendant as to warrant a new trial. *See United States v. Klee,* 494 F.2d 394, 396 (9th Cir.), *cert. denied* 419 U.S. 835 (1974).

C.

The evidence presented against Stockton at his trial included the testimony of Robert Gates, an eyewitness to the murder of Ronnie Tate. Gates testified that in July of 1979, he saw Stockton shoot and kill Tate for "running his mouth" about the Arnder murder. Stockton testified on his own behalf that he had killed Tate in self-defense when Tate, who was "real messed up on drugs," pulled a gun on him.

The state called Gates in rebuttal. Gates testified in graphic detail about how Stockton killed Tate in cold blood. He testified that Stockton shot Tate in the chest. Stockton then walked over to Tate and told him to get up or he would shoot him in the face. About five minutes after Stockton shot Tate the first time, Stockton shot Tate

twice more as he begged for his life. Stockton then forced Gates to dig a grave for Tate's body and threatened to do the same thing to Gates if he talked about the murders.

Stockton reiterates here the claim previously raised on his direct state appeal, that this testimony was so inflammatory and prejudicial as to amount to a denial of his due process right to a fair trial. We agree with the Virginia Supreme Court, however, which held that "the testimony was so relevant and probative to the truth-finding process that its probative value greatly outweighed any prejudicial effect." *Stockton*, 314 S.E. 2d at 383; *see United States v. Pate*, 426 F.2d 1083, 1086 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971).

As the Virginia Supreme Court observed:

> The only reasonable inference which can be drawn from Gates' testimony is that Tate knew Stockton killed Arnder, and Stockton, believing Tate was telling others about the murder, killed Tate to silence him. Clearly, the two offenses were interrelated, and Gates' testimony showed both Stockton's guilty knowledge of Arnder's murder and his desire to conceal his guilt.

Stockton, 314 S.E. 2d at 383.

It is true that the details of the Tate murder were gruesome, but this was unavoidable due to the nature of the act. Probative evidence of knowledge is not rendered inadmissible simply because it depicts a hideous crime. Moreover, the admissibility of evidence is generally a matter of state law which does not properly concern a federal habeas court unless it impugns the fundamental fairness of the trial. *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960). Stockton was not denied due

process by the introduction of this evidence, the relevance and probative value of which outweighed any possibility of unfair prejudice to him.

D.

Stockton contends that Commonwealth Attorneys engaged in several acts of misconduct designed to discredit the testimony of Stockton and principal defense witnesses, which denied him due process. We find these contentions meritless.

Randy Bowman testified that in July of 1978, when he, Stockton, Ronnie Tate, "Sunshine" Hatcher, and Tommy and Diane McBride were at the McBrides' house, Tommy McBride offered Bowman $1,500 to kill Kenneth Arnder. He further testified that Stockton offered to do the job because he needed money. This testimony conflicted with that of Tommy and Diane McBride. Tommy McBride testified that he did not offer to pay Stockton, Bowman or anyone else to kill Arnder. Diane McBride testified that the events described by Bowman never took place.

Stockton contends that the Commonwealth indicted Tommy McBride as the principal in the murder for hire of Arnder for the sole purpose of impeaching his testimony on behalf of Stockton. Both the Virginia Supreme Court and the federal district court found no evidence to support this claim. The fact that McBride's indictment was obtained two weeks before Stockton's trial, was served on the day McBride testified, and was dismissed three weeks after Stockton's sentence so McBride could be prosecuted in North Carolina does not give rise to an

inference of an improper motive on the part of the state. In fact, any inference must be to the contrary since, under Virginia law, the indictment had to be brought by the action of a grand jury which must find probable cause to return a "true bill." *See* Virginia Code § 19.2-191 (1983).

Furthermore, Stockton has failed to show that he was in any was prejudiced by the government's use of the indictment to impeach McBride. McBride's prior criminal record already put his credibility in doubt. McBride was allegedly the principal in the murder for hire. His involvement in the murder could have been argued with or without the indictment. McBride's incentive to deny hiring Stockton to kill Arnder remained the same whether or not he was under indictment, and Diane McBride was similarly interested in protecting her husband in either case. The evidence amply supports the state court's conclusion that Stockton failed to prove his allegations of improper motive and that, in any event, the indictment resulted in no prejudice to Stockton. *Stockton*, 314 S.E. 2d at 387.

Stockton also alleges prosecutorial misconduct as a result of improper cross-examination of him by the state. No objection to this testimony was made until the day after it was presented. The Virginia Supreme Court found that Stockton had waived his objection to this evidence by failing to object contemporaneously to its introduction. *See Stockton*, 314 S.E. 2d at 384 n.2. The state court's finding of procedural noncompliance under state law binds the federal courts, and Stockton has failed to establish "cause and prejudice" for his failure to follow Virginia's contemporaneous objection rule. *Wainwright v. Sykes*, 433 U.S. at 86-87.

E.

Stockton contends that the district court improperly refused to consider newly discovered evidence that Bowman had lied when he testified that Stockton accepted McBride's offer to pay $1,500 for the murder of Kenneth Arnder. The newly discovered evidence consists of the affidavit of Bowman's cellmate, Frank Cox, in which Cox stated that Bowman told him that "he [Bowman] had lied at the trial of Stockton." Stockton argues that Bowman's testimony was the only evidence that Arnder was murdered for hire and that evidence challenging the credibility of that testimony is highly material.

We disagree. To warrant a federal evidentiary hearing on the basis of newly discovered evidence, the "evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend v. Sain*, 372 U.S. at 317. The grounds for habeas relief on the basis of newly discovered evidence are exceedingly narrow:

> When public officers connive at or knowingly acquiesce in the use of perjured evidence, their misconduct denies a defendant due process of law. Recantation of testimony alone, however, is insufficient to set aside a conviction on the ground that the due process caluse has been violated. A habeas corpus petitioner must show that the prosecutor or other government officers knew the testimony in question was false in order to prevail.

Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir. 1975) (citations omitted), *cert. denied*, 423 U.S. 933 (1975).

Stockton has made no allegations of prosecutorial misconduct with respect to Bowman's testimony. In addition, the evidence he proffers is not of such a nature as to bring about a different trial result. There has been no proffer that Bowman would himself recant his prior testimony and it is questionable whether Cox's hearsay testimony of Bowman's alleged statements would be admissible at trial. This hearsay evidence addressed only the credibility of Bowman's testimony, which had been contradicted by four other witnesses, including the defendant. Stockton is therefore not entitled to relief on this ground.

IV.

The judgment of the district court denying habeas relief on Stockton's conviction of murder for hire is affirmed. The judgment vacating his death sentence and imposing a sentence of life imprisonment or awarding a new sentencing hearing is also *AFFIRMED*.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in those parts of the opinion which affirm the conviction and which otherwise deny relief, but, as to the question of jury bias, I respectfully dissent.

I doubt the validity of applying our *Haley* presumption of prejudice[1] in this case following the decision in

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[1] *Haley* is a rule of *federal procedure* merely, following *Remmer I* which was the same. We now apply it as a constitutional imperative without regard to *United States v. Frady*, 456 U.S. 152 (1982), which emphasized the higher burden on collateral

(Continued on following page)

Smith v. Phillips, 445 U.S. 209 (1982), although I recognize that *Haley* is the rule in this circuit. I also doubt that Federal Rule of Evidence 606(b) should be applied over literally so as not to permit the State to introduce at least some evidence from the jurors who heard any remarks by Puckett to say whether or not such remarks had any effect on them personally, this without invading the deliberations in the jury room and so as to uphold, not impeach, the verdict. To hold, as we do, that any extraneous communication to a juror is presumably prejudicial unless innocuous, and then prevent the State from proving lack of prejudice by the very juror involved, very nearly places the State in a box from which escape is difficult if not impossible. Such questions of bias are freely explored on voir dire prior to a trial, and limited exploration of the same "with great caution in the use of such evidence" would seem to have been the rule absent Rule 606(b). *Mattox v. United States*, 146 U.S. 140, 148 (1892). See also *Smith v. Phillips*, 455 U.S. 209, 217 n.7 (1982), which did not consider Rule 606(b). Indeed, *Remmer v. United States*, 350 U.S. 377 (1956) (*Remmer III*), requires the inquiry at the required hearing to include the " . . . communication with the juror and the impact

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attack of a criminal judgment. I acknowledge, however, that *Smith*, p. 221, may be construed as interpreting *Remmer I* as constitutionally "requiring a post trial hearing on juror bias."

In *Tanner v. United States*, 55 L.W. 4942 (1987), the Court did construe Rule 606(b) as limiting juror testimony to impeach the verdict, but it dealt with self imposed drinking during the (Cont.) trial, a matter it treated as intrinsic bias rather than bias from an extrinsic source, as here.

thereof upon him then, immediately thereafter, and during the trial. . . ." 350 U.S. at 379. If the Constitution imposes a hearing on the States, as here, then the rules of the hearing must also be imposed regardless of Rule 606(b).

While the above protests may turn out to be little more than lamentations about a result I think is unjustified on account of the almost casual comments of a restaurateur, our decision, I think, has a pronounced and basic flaw. That is that Stockton is procedurally barred from raising this claim under *Wainwright v. Sykes*, 433 U.S. 782 (1977), and subsequent like cases. Since Stockton could have raised the question on direct appeal and did not, absent cause and prejudice, which are not present here, he is procedurally barred under state law from its consideration in a state court, and we may not consider it now. *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980) (en banc). See also *Murray v. Carrier*, 477 U.S. 478, 489 (1986).

An examination of the opinion of the Supreme Court of Virginia in 314 S.E.2d 371 (Va. 1984), of the 19 assignments of error in that case and of the briefs filed discloses no mention of jury bias on account of the offending statement by Puckett so pronounced as to be worthy of argument in the sense presented here.

The minor consequence that was laid to this is corroborated by an examination of Stockton's petition for collateral relief by way of habeas corpus filed in the Circuit Court of Patrick County, and the written opinion of that court denying relief, which petition was prepared by attorneys instead of by Stockton, and which included

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rd v. Connor, 404 U.S. 270 (1971), the Court federal petitioner who is a state prisoner must ent the state courts with the same claim he the federal courts." 407 U.S. at 276. The Court t that "This is not a case in which factual were made to the federal courts that were not state courts." 404 U.S. at 276. It was a case in te prisoner had never brought before the state urteenth Amendment claim of denial of equal of the laws. Rather, his claim, upon the same whether the indictment procedure in Massas consistent with the Fifth Amendment's t of grand jury indictment. While the prisoner d in the state courts under the Fourteenth t as it respected his Fifth Amendment claim, presented his Fourteenth Amendment equal claim to the state courts. The Court held that r had not " . . . provided the Massachusetts " 'an opportunity to apply controlling legal o the facts bearing upon [his] constitutional 404 U.S. at 270. And, most importantly, the court added "To be sure, respondent presented all the facts. Yet he constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts." 404 U.S. at 270.

I see no significant difference in the case before us and *Picard*. While *Picard* was a case involving exhaustion of state remedies, its procedural rule for presenting a

claim should apply here. No claim is made of cause which prevented the raising of the claim. Accordingly, I suggest that *Wainwright* should control the disposition of this case.

I am supported in my reasoning by the record of the state trial, and the likely reason for the claim not having been perfected heretofore. Everyone connected with the case simply thought there was nothing to it, and there was not.

After the conclusion of the state trial, the attorneys moved to set aside the verdict on the ground of jury bias by reason of the now complained of statements by Puckett. The state court had a hearing at which all interested parties were permitted to participate and at which evidence was taken which met the requirements of *Remmer I* and *Smith*. The trial court heard the testimony of a Mr. and Mrs. Blackard, who were not jurors but were present, and of one Cockram who had been the foreman of the jury.

Mrs. Blackard testified on direct examination:

Q. All right, now, tell the Judge what you saw and what you heard.

A. They were sitting together and, ah, Glen Puckett, the owner of the diner, came up and was talking to them about the trial. He wanted to know if they had reached a verdict and one of them, I did not know which one, said that all of them had decided except for one woman, something to that effect is what was said.

And, on cross-examination, she added nothing:

Q. Mrs. Blackard, the only statement made was-the only statement made by this third person, Mr. Puckett, was he asked if they had reached a verdict and the response was that, ah, they were all in agreement except for one lady.

A. Something to that effect, yes.

Her husband, Blackard, on direct examination, testified:

Q. With Mr. Puckett. And how do you know they were talking about the trial and not talking about going fishing or hunting or something?

A. Well, ah, Glen [Puckett] came up and asked them if they'd come to a verdict yet and, ah, the best of my knowledge, they said that had all except for one, ah, one person, no, he said for one reason and, ah, Mr. Puckett said what's that; he said haven't you guessed yet, it's a damned woman. And then, ah, as I recall, Glen Puckett says something to the effect, said I hope they fry that son-of-a-bitch.

But, on cross examination, one of his responses was:

Q. Mr. Blackard, other than the statement made by the-by Mr. Puckett in which he inquired about whether they had reached a verdict, that was really the only conversation that you heard, isn't that right?

A. That's true.

After the conclusion of the testimony and argument of counsel, the court delivered its oral decision, which is quoted in full:

THE COURT: All right, gentlemen. If I understood Mr. and Mrs. Blackard's statement as to what they

> heard was said, was that this Mr. Puckett asked if they had reached a decision and some comment was made they all had decided but one woman. I feel that the statement in itself is not prejudicial, not harmful and Mr. Puckett says they didn't discuss anything any further. Mr. and Mrs. Blackard seem to suspect that maybe something else was said but they don't know what was said. So, based upon that, I see no harm or prejudice in the statement that was made and I'll overrule the motion.

From the trial court's opinion, we see that it found as a fact that "Mr. Puckett asked if they had reached a decision but some comment was made that they all had decided but one woman." It further found as a fact that "Mr. and Mrs. Blackard seem to suspect that maybe something else was said but they don't know what was said." Both of these findings are quite justified by the testimony. While it is true that Blackard testified on direct examination that Puckett had said "I hope they fry that son-of-a-bitch," it is just as true that on cross-examination that Blackard testified that it was true that " . . . other than the statement made by the-by Mr. Puckett in which he inquired about whether they had reached a verdict, that was really the only conversation that we heard, isn't that right?" (The latter part of the last sentence is clumsy grammar, but its import is such that I do not wish to lose effect by any accusation of quoting out of context)

I think that the trial judge was not required to accept Blackard's testimony that Puckett had said he hoped they would fry the son-of-a-bitch. Blackard, in one breath, stated that such offending statement had been made, and, in the next breath, denied it, so the trial judge was entitled to believe as he obviously did that the statement

had not been made.[2] This was entirely a question of the weight of the evidence and the credibility of the witnesses, a matter peculiarly entrusted to a trial judge, especially upon oral testimony, as here.[3] In addition, the finding of the state trial judge is supported by 28 U.S.C. § 2254(d). I further note that in *Smith* the finding of the state trial judge of no "prejudice against the [respondent]", 455 U.S. at 213, was accorded the presumptively correct protection of § 2254(d). 455 U.S. at 218. I see no reason the "no harm or prejudice" finding of the state trial judge here should not be accorded the same pre-

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[2] The hearing before the state trial judge showed that Blackard had been convicted of four felonies. In the intervening four years between then and the hearing in the district court, he had been convicted of an additional five felonies, a total of nine. Yet, we are asked not to follow the state trial judge's assessment of credibility and weight of evidence, although Blackard was not even corroborated by his wife.

[3] The majority takes the trial judge to task because the trial judge recited that Puckett had testified at the hearing on the motion, which he had not, rather than Cockram, who had. While I think it is apparent that this substitution of names was nothing more than a slip of the tongue or of a stenographer's pencil, I have not referred to Cockram's testimony in the body of this dissent so as not to detract from the trial judge's finding. If Cockram's testimony were considered, there is even more reason to give weight to the trial court's finding:

> Q. This, ah, you may feel that this puts you on the spot a little bit but I have to-sometimes I have to do that, ah, do you recall the events of that Thursday at lunch well enough to disagree with what Mr. and Mrs. Blackard said? Are you saying that that didn't happen, that Mr. Puckett didn't come by and he didn't discuss the case with you or the people sitting at your booth?

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sumptive validity. There is no convincing evidence to the contrary. *Sumner v. Mata*, 449 U.S. 539, 551 (1981).[4]

Accordingly, I would reverse the grant of the writ.

(Continued from previous page)

A. Other than the comment of are you about to reach a decision, which was sort of a normal question, everybody we met that day asked us, ah, no other discussion that I recall took place concerning the case.

Q. Do you recall whether Mr., ah, or whoever the man was that came over to the table made commentary to you about what ought to be done with the defendant or what he hoped was done with the defendant?

A. Ah, He didn't make any comments to me.

Q. All right. Did you hear him make any comments to others at the table about that?

A. That's really hard for me to say. Like I say, he did not come to talk to me because I don't know the man, so, I don't.

Q. All right. Did you hear him or someone other than him, who came over to the table, make comments to your fellow jurors? Did you hear him say anything like that?

A. Not that I thought had any effect or event pertained really to the case. Ah, It was typical comments. We hope you finish up this afternoon, ah, I don't really remember anything in particular because I think it was a point that most of the jury members, I think, felt the way I did. We wanted a time to get away and think a little bit and I wasn't in the mood for a conversation.

[4] We should also take into consideration that the state hearing was held June 7, 1983, only 68 days after the verdict, while the hearing in the district court was April 20, 1987, with depositions being taken March 17 and 18, 1987, some four years later. Thus, any difference in testimony should be resolved in favor of the fresher recollection available in the state court.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-4002
No. 87-4003

Dennis Waldon Stockton,

Petitioner - Appellee,

v.

Commonwealth of Virginia, et al,

Respondents - Appellants.

(Filed September 27, 1988)

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, District Judge.

Appellants' petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

On the question of rehearing before the panel, Judge Widener voted to rehear the case. Judges Ervin and Wilkinson voted to deny.

In a requested poll of the Court on the suggestion for rehearing en banc, Judges Winter, Phillips, Murnaghan, Sprouse, Ervin, Wilkinson, and Wilkins voted to deny rehearing en banc; and Judges Russell, Widener, Hall, and Chapman voted to grant rehearing en banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing en banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Wilkinson.

For the Court

/s/ John M. Greasen
CLERK

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1074

In The
Supreme Court of the United States
October Term, 1988

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

DENNIS WALDON STOCKTON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The
Supreme Court of the United States
October Term, 1988

No. 88-1074

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

DENNIS WALDON STOCKTON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Dennis Waldon Stockton, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed herein by the Commonwealth of Virginia and Edward W. Murray, Director, Virginia Department of Corrections ("Petitioners" or "the Commonwealth").

COUNTERSTATEMENT OF THE CASE

Respondent refers the Court to the opinions of the District Court and Court of Appeals below for a more complete summary of the facts than that contained in Petitioners' Statement of the Case. See Pet. 4a-6a, 13a-16a, 35a-38a, 41a-46a, and 54a-67a.[1] In addition, Respondent highlights below certain facts that are relevant to this Court's review.

In March 1983, Dennis Stockton was tried for the 1978 murder of Kenneth Arnder in the Circuit Court of Patrick County, Virginia. Patrick County is a small, rural county in Southwest Virginia with a population of less than 20,000 people. Stockton's trial was the first capital murder trial in Patrick County in the Twentieth Century. As noted by the Court of Appeals:

> [Stockton's] arrest and trial generated considerable local publicity. The print and broadcast media featured reports of the trial and pretrial proceedings as well as accounts of investigations connecting Stockton to several local murders, the discovery of the victims' bodies, and Stockton's past criminal history. In one newspaper article, Stockton was labeled "Surry County's public enemy number one" and compared to Charles Manson.

Stockton v. Commonwealth, 852 F.2d 740, 741-42 (4th Cir. 1988); Pet. 55a-56a. Due to this charged environment,

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[1] Citations to the Commonwealth's Petition for a Writ of Certiorari, which contains the decisions of the courts below, will be denoted as "Pet. __."

Stockton submitted a pretrial motion for a change of venue or, in the alternative, for sequestration of the jury. The trial court denied Stockton's motion. Throughout the three-and-one-half-day trial, jurors were released for meals and overnight.

The Commonwealth's case against Stockton rested solely on circumstantial evidence and controverted testimony. The Commonwealth failed to produce any physical evidence linking Stockton to the crime. The Commonwealth also failed to produce a murder weapon or any eyewitnesses. Stockton took the stand and denied any involvement in the Arnder killing, a position he has steadfastly maintained to the present day. Nevertheless, the jury found Stockton guilty of capital murder on March 23, 1983. On the next day, the jury recommended that Stockton be sentenced to death.

Shortly after Stockton's trial, Stockton's trial counsel learned of an improper third-party contact with the jury. Counsel was informed that Glen Puckett, the owner of the local Owl Diner, had approached several of the jurors while they were on a lunch break during the penalty phase deliberations and told them, "I hope you fry the son-of-a-bitch," or words to that effect. Stockton moved to set aside the verdict on the basis of that comment. The trial court denied Stockton's motion.

On October 1, 1986, Stockton filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia (Kiser, J.). Stockton alleged, inter alia, that he had been denied his constitutional right to a fair trial as a result of the jury's exposure to Puckett's prejudicial "fry the son-of-a-bitch" comment. The District Court granted Stockton an evidentiary hearing on this issue. Pet. 1a.[2] In addition, the District Court authorized undersigned counsel to depose the jurors from Stockton's trial.

At the evidentiary hearing, the District Court heard testimony from two witnesses to the Owl Diner incident, James Blackard and his former wife Ginger Hall, and from Glen Puckett. The Court also received deposition testimony of the jurors.[3] The testimony

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[2] The District Court granted this hearing because it found that the state trial court had failed to "make findings as to the issue of Puckett's comments to the jurors at the Owl Diner." Pet. 42a. The District Court determined further that the state court hearing had not been "full and fair." Pet. 18a. Accordingly, the District Court held that no presumption of correctness, as prescribed by 28 U.S.C. § 2254(d), attached to any of the state court's findings regarding Puckett's comments. Pet. 42a. This ruling was affirmed by the Court of Appeals. 852 F.2d at 745 & n.2; Pet. 63a-64a & n.2.

[3] The District Court declined to consider juror testimony concerning the effect of the "fry the son-of-a-bitch" remark upon the jurors' mental processes or the jury's deliberations, in accordance with Fed. R. Evid. 606(b). Pet. 40a-41a. The Court of Appeals concurred in this ruling. 852 F.2d at 743-44; Pet. 61a.

clearly established, and the District Court found, that during a lunch break taken in the midst of the jury's sentencing deliberations, Puckett had approached three male jurors, who were having lunch together at the Owl Diner, and told them, "I hope you fry the son-of-a-bitch," or something similar.[4] Pet. 35a-37a, 41a.

The District Court concluded that Puckett's "fry the son-of-a-bitch" remark had deprived Stockton of his Sixth Amendment right to a fair trial by an impartial jury. In reaching this conclusion, the District Court applied the analysis for extrajudicial juror contacts set forth by this Court in Remmer v. United States, 347 U.S. 227 (1954) ("Remmer"), as adopted by the Fourth Circuit in Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986). Pet. 39a. The District Court first determined that Stockton had met his burden of proving that the jurors were in fact exposed to an extrajudicial contact that related directly to "the focus of the jury's deliberations, i.e., whether to impose a life or death sentence upon Stockton."

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[4] There was additional evidence that on that same day Puckett also approached a group of three female jurors to whom he said something "nasty" about Stockton. Pet. 37a. Puckett himself testified that, while he did not recall making the "fry the son-of-a-bitch" statement, "knowing me, I could have said it." Pet. 36a.

Pet. 40a-41a. The District Court then found that Puckett's comments were far from "innocuous" -- "[i]ndeed, a comment could not be more pointed than 'I hope you fry the son-of-a-bitch'" -- and therefore raised a rebuttable "presumption of prejudice." Id. Finally, the District Court held that the Commonwealth had failed to rebut this presumption. Pet. 42a-46a. Thus, the District Court concluded that Stockton's Sixth Amendment rights had been violated and that the Commonwealth should give Stockton a new sentencing hearing or reduce his sentence to life imprisonment. Pet. 46a-47a.

The Court of Appeals for the Fourth Circuit, in an opinion by Judge Wilkinson, affirmed. The Court of Appeals held that extrajudicial contacts relating directly to the matter pending before the jury are to be viewed as presumptively prejudicial, and that the burden rests on the government to rebut the presumption, in accordance with Remmer and Mattox v. United States, 146 U.S. 140 (1892). 852 F.2d at 743; Pet. 60a. The Court of Appeals rejected Petitioners' argument that the Remmer presumption of prejudice attaching to extrajudicial communications was overturned by this Court in Smith v. Phillips, 455 U.S. 209 (1982). 852 F.2d at 744; Pet. 61a-62a. Moreover, the Court of Appeals agreed with the District Court that Petitioners

had failed to rebut the presumption in this case. As Judge Wilkinson wrote for the Court of Appeals:

> This was no mere offhand comment. Puckett knew that he was addressing his opinion to members of the jury -- his comment about what should happen to Stockton was preceded by an inquiry as to whether the jurors had reached a decision. Further, the comment bore on the exact issue -- whether to impose the death penalty -- that the jurors were deliberating at that time. . . . Although many jurors attempted dutifully to ignore expressions of public opinion and to avoid commenting on the case, they were powerless to avoid contact with the public. As a result they were exposed to the type of pointed and prejudicial suggestion whose utterance encourages the all too human tendency to pursue the popular course.

852 F.2d at 746; Pet. 65a-67a.

SUMMARY OF ARGUMENT

Almost a century ago, this Court declared that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. at 150. In Remmer v. United States, this Court reiterated this rule:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending

> before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229 (citations omitted).[5] Since at least the time of Remmer, courts throughout the United States have applied this presumption of prejudice analysis to extrajudicial contacts with jurors. See discussion, infra pp. 12-13.

Petitioners, however, contend that this Court, in Smith v. Phillips, eliminated the Remmer presumption of prejudice. Petitioners further contend that a "sharp split" exists in the federal circuits on this issue and that this purported split requires the Court's review of the Court of Appeals' decision.

The petition for a writ of certiorari should be denied. First, Petitioners agreed, in the District Court below, that the Remmer "presumption of prejudice" test should be applied in this case. They should not be permitted to raise an issue in this Court that they did not present to the District Court.

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[5] Because Sixth Amendment rights are "fundamental to the American scheme of justice," they are applicable to state court criminal prosecutions. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). See also Parker v. Gladden, 385 U.S. 363, 364 (1966).

Second, the asserted conflict among the circuits does not warrant review in this case. Except for the Sixth Circuit, no other circuit has concluded that the Remmer presumption is no longer applicable to cases involving extraneous jury contacts. On the contrary, nine circuits have continued to apply the Remmer presumption in these cases, and two circuits have not yet established a clear position on this issue. Moreover, the Sixth Circuit itself may not have fully resolved its views on this question. And most importantly, the conflict is not squarely presented by this case. The Sixth Circuit has not yet addressed the application of the presumption in circumstances such as these, in which the improper contact was not discovered until after the jury had concluded its deliberations and the jurors were accordingly prohibited from testifying about the impact of the contact on their verdict.

Finally, the petition should be denied because the decision below was correct. Smith v. Phillips was a reaffirmation, not a reversal, of Remmer. Neither Phillips nor United States v. Frady, 456 U.S. 152 (1982), invalidates the presumption of prejudice employed by the courts below. That presumption is required in improper contact cases because of Fed. R. Evid. 606(b) and the prior holdings of this Court. The burden imposed by the presumption of prejudice on the

party defending the verdict is far from insurmountable. That Petitioners were unable to rebut the presumption in this case simply confirms the seriously prejudicial nature of Puckett's "fry the son-of-a-bitch" remark.

REASONS FOR DENIAL OF THE WRIT

I. Petitioners Failed To Raise the Issue on Which Certiorari Is Sought in the District Court

Although Petitioners assert that the question presented in their Petition is one of "special importance," Pet. 7, Petitioners did not question the use of the Remmer "presumption of prejudice" test in the District Court. In their Post-Trial Memorandum, submitted after the evidentiary hearing, Petitioners stated that, "For the purposes of this Memorandum, [the Commonwealth] will assume, without conceding, that [Stockton] has submitted an appropriate analytical framework." Commonwealth's Post-Trial Memorandum at 9.[6]

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[6] The Commonwealth also accepted Remmer as the appropriate standard at the District Court hearing on April 20, 1987, as reflected in the following exchange:

> The Court: "So you're basically agreeing that the Haley framework is the correct one."
>
> Mr. Ferguson [for the Commonwealth]: "Yes, sir, I think it certainly is a usable one, in the context of this case anyway."

Transcript of April 20, 1987 Hearing at 52.

As the District Court noted: "The parties agree that the proper analytical framework to be applied . . . is set forth in the case of Haley v. Blue Ridge Transfer Co.," which followed the Remmer presumption. Pet. 39a.

The Commonwealth first argued that Smith v. Phillips had overruled the Remmer "presumption of prejudice" only after the adverse ruling in the District Court, when this case was on appeal in the Fourth Circuit. A party may lose its right to raise an issue in this Court "when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." Steagald v. United States, 451 U.S. 204, 209 (1981); cf. Lawn v. United States, 355 U.S. 339, 362 n.16 (1957) ("Only in exceptional cases will this Court review a question not raised in the court below."). Petitioners forfeited their right to contest the applicability of the Remmer presumption when they acquiesced in the use of that standard in the District Court. See Steagald, 451 U.S. at 208-11.[7]

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[7] The Court of Appeals below addressed this issue on the merits. Nevertheless, the Court of Appeals should have rejected Petitioners' argument on the ground that Petitioners had not even raised this point in the District Court. See, e.g., United States v. Seidlitz, 589 F.2d 152, 160 (4th Cir. 1978), cert. denied, 441 U.S. 922 (1979).

II. This Case Does Not Squarely Present a Conflict Among the Federal Circuits Warranting Review by This Court

Petitioners argue that there is a "split" in the circuits concerning the continued applicability of the Remmer "presumption of prejudice" rule since Smith v. Phillips which warrants this Court's review. Stockton respectfully disagrees.

The "split," to the extent that it exists at all, involves a single circuit. Apart from the Sixth Circuit, no other circuit has concluded that the Remmer presumption of prejudice is no longer applicable in cases involving extraneous jury contacts. On the contrary, nine circuits have continued to apply the Remmer presumption in these cases. See, e.g., United States v. Wiley, 846 F.2d 150, 157-58 (2d Cir. 1988); United States v. Leon, 739 F.2d 885, 893 n.20 (3d Cir. 1984); Haley v. Blue Ridge Transfer Co., 802 F.2d at 1535-37 (4th Cir. 1986); Owen v. Duckworth, 727 F.2d 643, 646 (7th Cir. 1984); United States v. Robinson, 756 F.2d 56, 59 (8th Cir. 1985); United States v. Littlefield, 752 F.2d 1429, 1431-32 (9th Cir. 1985);[8] United States v. Hornung, 848 F.2d 1040,

[8] Petitioners claim that the Ninth Circuit, like the Sixth Circuit, has rejected the use of the Remmer presumption in cases of extraneous juror contacts, citing United States v. Madrid, 842 F.2d 1090 (9th Cir.), cert. denied, 109 S. Ct. 269 (1988). Pet. 13. The decision in Madrid, however, appears to have been limited to cases involving "ex parte contacts which [do]

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1043-46 (10th Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1503 (11th Cir. 1986), cert. denied, 107 S. Ct. 3265 (1987); United States v. Butler, 822 F.2d 1191, 1194-96 (D.C. Cir. 1987). The two remaining circuits -- the First[9] and Fifth[10] -- have not yet established a clear

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not pertain to 'any fact in controversy . . . applicable to the case.'" 842 F.2d at 1093 (citation omitted; emphasis added). It is therefore consistent with Remmer, which required that prejudice be presumed only where the contact concerned "the matter pending before the jury." 347 U.S. at 229. In such cases, the Ninth Circuit has consistently applied the Remmer presumption since Phillips. See Dickson v. Sullivan, 849 F.2d 403, 405-08 (9th Cir. 1988); United States v. Kupau, 781 F.2d 740, 744-45 (9th Cir.), cert. denied, 479 U.S. 823 (1986); Littlefield, 752 F.2d at 1431-32.

[9] Petitioners suggest that the First Circuit has joined the Sixth Circuit's analysis, citing Neron v. Tierney, 841 F.2d 1197 (1st Cir.), cert. denied, 109 S. Ct. 90 (1988). Neron, however, was a case involving inherent juror bias, and not extraneous contacts.

Other First Circuit decisions regarding improper juror contacts suggest that that court will continue to apply the Remmer presumption. In United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981), a pre-Phillips decision, the court adopted the Remmer presumption in the context of ex parte communications between juror and judge. Id. at 601-02. Flaherty was later relied on in Vontour v. Vitale, 761 F.2d 812 (1st Cir. 1985), cert. denied sub nom. Saugus v. Vontour, 474 U.S. 1100 (1986), a post-Phillips case, also involving ex parte communications between judge and jury. Id. at 815-17.

[10] Petitioners cite to Miller v. Estelle, 677 F.2d 1080 (5th Cir.), cert. denied, 459 U.S. 1072 (1982), a case in which the Fifth Circuit declined to apply the Remmer presumption to third-party contacts with jurors during the sentencing phase of the trial, id. at 1084-86. As Petitioners note, however, this ruling was not based on Smith v. Phillips. Pet. 14. Rather, the panel mistakenly treated the presumption of prejudice as an

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position on this issue.

Moreover, although the Sixth Circuit appears to have adopted a different rule, see United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), the Sixth Circuit itself may not have fully resolved its views on this issue. No doubt, the Pennell approach represents the predominant view in that circuit and, as Petitioners have noted, was recently reaffirmed. United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988). However, the issue has never been considered en banc by the Sixth Circuit, and Pennell itself was written over the vigorous dissent of Judge Celebrezze, who explained that the majority had "misapprehend[ed] the role of the presumption in both Remmer and [Smith v.] Phillips." As stated by Judge Celebrezze,

> In Phillips, the issue was whether a conclusive presumption of prejudice should apply. The issue of a

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outgrowth of the presumption of innocence. 677 F.2d at 1085. The decision also appears to have been motivated, at least in part, by a belief that the defendant was responsible for the contacts with the jury. See id. at 1082, 1085-86.

For these reasons, Miller does not support the proposition upon which Petitioners seek certiorari. As Petitioners themselves acknowledge, the Fifth Circuit has not yet determined whether Smith v. Phillips has affected the presumption of prejudice, see Abell v. Potomac Ins. Co., 858 F.2d 1104, 1146 (5th Cir. 1988). Pet. 15.

> conclusive presumption, more often termed the doctrine of "implied bias," involves a different line of cases than those which address a presumption of prejudice.

737 F.2d at 539 (emphasis in original; footnote omitted). Furthermore, a recent Sixth Circuit decision has continued to follow the Remmer presumption of prejudice in a case involving extraneous jury contacts. Atkins v. Foltz, No. 87-1341 (6th Cir. Aug. 24, 1988) (unpublished opinion; text on LEXIS). See also McLaurin v. Parke, No. 82-5460 (6th Cir. Jan. 20, 1983) (unpublished opinion; text on LEXIS) (following Remmer presumption of prejudice test in post-Phillips case).

Under the circumstances, this would not be an appropriate case for the exercise of the Court's limited certiorari jurisdiction. Given the clear majority position of the circuits on this question, we respectfully suggest that the Court should allow time for the Sixth Circuit to reconsider its position. If the Sixth Circuit declines to reconsider this issue, the Court might then resolve the issue in a case from that circuit.

Finally, and most importantly, despite the Sixth Circuit's apparent departure from the majority view concerning the continuing vitality of the Remmer presumption in general, there is no conflict among the circuits with respect to the specific issue presented by

this case. There is a crucial factual distinction between the Sixth Circuit's decisions in Pennell and Zelinka and the present case. In both of these Sixth Circuit cases, the extraneous contact was discovered -- and the resulting hearing on potential juror bias was held -- prior to entry of the jury's verdict. Thus, the trial judge was able to investigate the alleged incident and question the jurors about their ability to remain impartial. The trial judge was able to take steps to ensure that the contact was harmless, such as admonishing the jurors to ignore the extraneous comment in their deliberations.

Here, however, the contact was not discovered until after the verdict. Therefore, the evidentiary hearing concerning the "fry the son-of-a-bitch" remark was conducted pursuant to Federal Rule of Evidence 606(b), which precluded juror testimony about the impact of the extraneous comment on their verdict.[11]

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[11] Rule 606(b) permits a juror to testify about the existence of extrajudicial contacts, but not about their effect on the jury's deliberations or the basis for the verdict. The rule represents a compromise between two important objectives. On the one hand, Rule 606(b) seeks to promote the freedom of jury deliberations, to further the stability and finality of verdicts, and to protect jurors against annoyance and embarrassment. Cf. McDonald v. Pless, 238 U.S. 264, 268 (1915). On the other hand, Rule 606(b) attempts to ensure that a defendant is not deprived of a fair trial by an impartial, untainted jury; it allows inquiry into the factual circumstances concerning contacts outside the

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See note 3, supra. In cases involving post-verdict hearings, the Remmer "presumption of prejudice" arises, at least in substantial part, because of the inability to question jurors on the effect of potentially prejudicial remarks. See, e.g., United States v. Hornung, 848 F.2d at 1045 (Remmer presumption is necessary because of evidentiary proscription of Rule 606(b)); Haley, 802 F.2d at 1537 & n.10 (Rule 606(b) provides persuasive rationale for presumption of prejudice with burden of rebuttal on party who benefited from verdict); 3 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 606(05), at 606-59 (1988) ("Since a juror may not testify as to how any extraneous material affected his decision, once the introduction of extraneous material has been established, a presumption of prejudice becomes operative."). See also Stockton, 852 F.2d at 743-44; Pet. 61a.

Here, the lower courts applied the Remmer presumption to an improper juror contact discovered post-trial. Pennell and the other Sixth Circuit cases cited by Petitioners did not arise in this context. Thus, the Sixth Circuit has not had the opportunity to

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courtroom. See Advisory Committee Note on Rule 606, reprinted in 10 J. Moore & H. Bendix, Moore's Federal Practice § 606.01[6] (1988); see also Tanner v. United States, 483 U.S. 107 (1987).

consider whether the "presumption of prejudice" rule should be applied in cases like this, which are subject to Rule 606(b). There is, therefore, no conflict among the circuits on the issue presented by this case.

III. The Courts Below Were Correct in Applying the Presumption of Prejudice Test to the "Fry the Son-of-a-Bitch" Remark

Finally, the decision of the Fourth Circuit in this case is wholly consistent with Supreme Court precedent. Petitioners contend that the Remmer "presumption of prejudice" has been overruled by the following language in Phillips: "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215. Immediately after the quoted sentence, however, Phillips cites to Remmer as an example of how cases of alleged juror partiality should be resolved and expressly notes that the Remmer court viewed the extraneous contact in that case as "'presumptively prejudicial.'" Id. (quoting Remmer, 347 U.S. at 229). Petitioners' argument is undermined by the Phillips Court's reliance on Remmer.

In Phillips, this Court held that issues of juror bias properly should be addressed through a hearing "like that ordered in Remmer." Id. at 217 (footnote omitted). As noted above, a Remmer hearing is one in

which the burden of proof rests upon the government to establish that an outside influence on the jury was "harmless to the defendant." Remmer, 347 U.S. at 229. Similarly, in Phillips, this Court refused to find inherent bias because the "state trial court [had] determined 'beyond a reasonable doubt' that a juror's out-of-court action did not influence the verdict." Rushen v. Spain, 464 U.S. 114, 119 n.3 (1983).

In short, Phillips did not overrule the Remmer "presumption of prejudice." On the contrary, the Phillips Court simply rejected the argument that a conclusive presumption of prejudice should be applied under the facts of that case. Phillips reemphasized that the Remmer presumption is rebuttable, not conclusive, and that issues of alleged jury bias are therefore to be resolved through an evidentiary hearing at which the government is given an opportunity to rebut the presumption. 455 U.S. at 215-17. Far from overruling Remmer, the Phillips Court criticized the lower courts in that case for failing to follow its teachings. Id. at 218.

Even assuming, arguendo, that Phillips implicitly rejected the use of a "presumption of prejudice" test on the facts presented, Phillips does not conflict with the decision of the Court of Appeals below. Phillips involved an issue of juror impairment or predisposition,

a matter that can be exposed at voir dire, whereas this case, like Remmer, involves the effect of an extrajudicial communication during trial upon the deliberative process of the jury. 852 F.2d at 744; Pet. 62a. See also Haley v. Blue Ridge Transfer Co., 802 F.2d at 1535-36 n.5 (voir dire is an effective method of rooting out intrinsic juror bias). Obviously, voir dire cannot prevent bias resulting from improper contacts with jurors during the trial. Thus, even if Phillips did reject the use of a "presumption of prejudice" test in inherent bias cases, it did not reject the use of this test in cases involving extraneous jury contacts.[12]

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[12] Petitioners further suggest that this Court's decision in United States v. Frady, 456 U.S. 152 (1982), requires application of an "actual prejudice" test in this habeas corpus action. Pet. 17-18. Petitioners' reliance on Frady is misplaced. Frady only required a habeas corpus petitioner to demonstrate "actual prejudice" in order to satisfy the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977), to overcome the procedural bar resulting from failure to preserve a claim in state court. 456 U.S. at 167-68. Frady is inapposite to the present case, in which Stockton's constitutional claim of juror partiality was presented to the Virginia state courts. See 852 F.2d at 743 n.1; Pet. 58a-59a n.1.

Moreover, Smith v. Phillips was itself a habeas case. And, as discussed above, Phillips reaffirms Remmer. Phillips therefore demonstrates, contrary to Petitioners' contention, that the Remmer presumption of prejudice applies in habeas cases. The lower federal courts have often applied the Remmer presumption of prejudice test in habeas actions. See, e.g., Owen v. Duckworth, 727 F.2d at 646; Parrott v. Arkansas, 497 F.2d 1123, 1124-26 (8th Cir. 1974); Ladd v. South Carolina, 415 F.2d 870, 872-73 (4th Cir. 1969), cert.

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Petitioners contend that the "presumption of prejudice" test places an intolerable burden on the government due to the prohibition of Federal Rule of Evidence 606(b). This Rule works both ways, however: it prohibits defendants, as well as the prosecution, from calling jurors in order to obtain testimony concerning the effect of extraneous contacts on their deliberations. And if the question then becomes not whether there should be a presumption but which way the presumption should run, the Court of Appeals here reminded us that the Sixth Amendment guarantees the defendant -- not the government -- a right to an impartial jury. 852 F.2d at 744; Pet. 61a.[13]

Moreover, the defendant bears the initial burden of proof even with the presumption. The defendant must first come forward with evidence showing that jurors were exposed to prejudicial extrajudicial contacts and that those contacts related directly to the matter pending before the jury. See Remmer, 347 U.S. at 229.

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denied, 397 U.S. 1049 (1970). Cf. Parker v. Gladden, 385 U.S. at 365 (on review of state post-conviction proceeding, this Court deemed extraneous juror contact to be inherently prejudicial).

[13] More generally, our society's commitment to trial by an impartial jury requires that the burden be placed on the party defending a verdict reached by jurors exposed to prejudicial contacts -- in this case, the Commonwealth. See Mattox, 146 U.S. at 149-50; Haley, 802 F.2d at 1537.

In many instances, defendants will not even be able to prove that such contacts occurred. In these cases, the "presumption of prejudice" does not arise. See, e.g., United States v. Caporale, 806 F.2d at 1503; United States v. Robinson, 756 F.2d at 59. As the Court of Appeals noted below, "while a presumption of prejudice attaches to an impermissible communication, the presumption is not one to be casually invoked." 852 F.2d at 745; Pet. 63a.

In addition, even though Rule 606(b) prohibits jurors from testifying about the subjective impact of extraneous influences on their verdict, the government will often be able to rebut the presumption of prejudice based upon circumstantial evidence, including juror testimony concerning the facts and circumstances surrounding the extraneous communication. See, e.g., United States v. Hornung, 848 F.2d at 1043-46; United States v. Bagnariol, 665 F.2d 877, 883-89 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982). The fact that the Commonwealth was unable to rebut the presumption in this case does not indicate that the government will invariably, or even generally, be unable to make such a showing. Rather, it simply indicates the serious nature of the incident that took place in this case. "I hope you fry the son-of-a-bitch" was, as the District Court noted, the kind of remark that "would stick in the minds

of the jurors who heard it when they resumed their sentencing deliberations." Pet. 45a. As the Court of Appeals concluded: "Puckett's comment posed a potential for prejudice that was too serious to ignore." 852 F.2d at 745; Pet. 65a.[14] Cf. Parker v. Gladden, 385 U.S. at 363-65 (defendant deprived of Sixth Amendment right to fair trial where bailiff told a juror, "Oh that wicked fellow, he is guilty.").

Puckett's "fry the son-of-a-bitch" remark is particularly troubling in view of the fact that it was directed to the life or death question then squarely before the jury: whether Stockton should be executed or given a life sentence. As this Court has noted, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99 (1983) (footnote omitted). Here that determination was tainted by Puckett's inflammatory remark.

Respondent recognizes that the law must not ignore the "day-to-day realities of courtroom life," or

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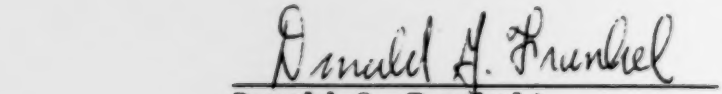
[14] In this case, the potential for prejudice was greatly heightened by the "casualness with which the trial was conducted." 852 F.2d at 746; Pet. 66a. The Court of Appeals was troubled by "the trial court's failure to take more modest steps [than sequestration or change of venue] to protect the jurors from community sentiment." Id.

undermine "society's interest in the administration of criminal justice." Rushen v. Spain, 464 U.S. at 119 (1983) (footnote omitted). The Remmer "presumption of prejudice" test, however, has not resulted, and will not result, in the invalidation of numerous convictions on dubious grounds. On the contrary, in recent years few convictions have been invalidated through application of the Remmer presumption in cases involving third-party juror contacts. That presumption, however, remains an important protection against improper influence on jurors. It ensures that jurors base their verdict solely on the evidence presented at trial, and thus protects "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v. Louisiana, 379 U.S. 466, 472 (1965).

CONCLUSION

For the foregoing reasons, Respondent urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

DENNIS WALDON STOCKTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners,

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DENNIS WALDON STOCKTON,
Respondent.

REPLY BRIEF FOR PETITIONERS

The petition for a writ of certiorari in this case presents a single issue: Does *Smith v. Phillips*, 455 U.S. 209 (1982), require that a party attacking a jury verdict on the basis of extraneous contacts with the jury prove actual prejudice.

THERE IS A CLEAR, EXPRESSLY ACKNOWLEDGED SPLIT AMONG THE CIRCUITS.

It is absolutely clear that various federal circuits are divided over the apportionment of the burden of proof in circumstances such as those presented by the instant case. The Sixth Circuit, in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), held that *Smith v. Phillips* requires that actual prejudice be shown by one who seeks to attack his conviction based upon a claim of juror partiality. The *Pennell* court expressly declined to draw a factual distinction between cases in which the alleged bias resulted from extraneous contacts and those where the factors were inherent in the jury itself.

> Although *Phillips* involved bias resulting from a juror's potential employment relationship with a law enforcement

agency, the principles set forth in the opinion apply to allegations of jury partiality generally. In essence, *Phillips* reinterpreted *Remmer*.

737 F.2d at 532.

The Sixth Circuit recently noted that it had consistently held that *Smith v. Phillips* reinterpreted *Remmer* and placed the burden upon the defendant to show bias, rather than placing the burden on the government to show that unauthorized contacts were harmless. *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988).

Moreover, *Pennell* cannot be construed so narrowly as to apply its holding only in cases where the outside contact is discovered during trial. The broad language in *Pennell* belies such a narrow interpretation. "[T]he burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed." 737 F.2d at 532. Such a distinction creates an almost irresistible temptation to "sandbag" when the defendant becomes aware of the contact during trial, but the court and prosecution do not. The defendant obtains a distinct advantage by making no complaint until after the verdict because he is then accorded an overwhelming presumption of prejudice. He no longer carries the burden of proving actual prejudice, plus he has the luxury of allowing the case to go to its conclusion, holding a powerful trump card should the verdict be unfavorable.

Indeed, a clever defendant will be able to arrange for a "presumptively prejudicial" contact with the jury during the course of his trial and silently keep that ammunition in reserve should he be found guilty. Thus, a strict limitation of *Pennell* (or *Smith v. Phillips*) to the facts is senseless from either a legal or policy standpoint.

Significantly, federal circuit courts have explicitly recognized that the conflict exists. The Sixth Circuit has acknowledged the split, indicating that at least two other courts have disagreed with *Pennell*. *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988). *See United States v. Butler*, 822 F.2d 1191, 1195-1196 n.2 (D.C.Cir. 1987); *see also Haley v. Blue Ridge Transfer*, 802 F.2d 1532, 1537, n.5 (4th Cir. 1986). The Fifth Circuit has also acknowledged that *Smith v. Phillips* has been interpreted, at least by the Sixth Circuit, as altering the "presumptive prejudice" test. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1145-1146 (5th Cir. 1988). Moreover, the Fifth Circuit noted that *Smith v. Phillips* cast a "forbidding shadow" on the *Remmer* presumption. 858 F.2d at 1144-45.

The Sixth Circuit's rule gives a defendant a hearing once he establishes a communication to a jury which is "presumptively prejudicial." He must then establish actual bias. *Smith v. Phillips* does not require the party defending the verdict to prove harmlessness beyond a reasonable doubt. The "presumption" acts to assure a hearing. It is not conclusive of the issues raised. The defendant must still make his case.

The Fourth Circuit rule stated in *Haley v. Blue Ridge Transfer* and now the decision below in this case, coupled with the strict evidentiary limitations of Rule 606(b) of the Federal Rules of Evidence, acts to create a *de facto* conclusive presumption *against* upholding a unanimous jury verdict. For example, using the Fourth Circuit's analysis in the instant case, no conceivable set of facts could provide the Commonwealth with evidence sufficient to overcome the presumption of prejudice. That situation does not exist as a result of the nature of the comments made by Puckett. Under the analysis used by the Fourth Circuit, any comment which bore upon the issue then before the jury, thus triggering the "presumption of prejudice", would have been sufficient to vacate the valid state court judgment. The Commonwealth found itself in a "box" created, on the one hand, by a presumption requiring vacation of the sentence, and on the other hand by the preclusion of the available evidence which would have established harmlessness beyond a reasonable doubt.[1]

THE ISSUE PRESENTED IS ONE OF EXCEPTIONAL IMPORTANCE REQUIRING RESOLUTION BY THIS COURT.

The decision below and Rule 606(b) combine to create an intolerable result. Stockton's case was fairly tried and the jury deliberated fully and carefully before reaching the verdict and imposing sentence. The circumstances surrounding the "fry the son-of-a-bitch" remark were reviewed

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[1] Petitioners are not procedurally precluded from presenting the conflict among the circuits as a basis for the writ of certiorari. Manifestly, resolution of such a split is exclusively within the province of this Court and is not a matter subject to the jurisdiction of the courts below. Moreover, petitioners are not precluded from arguing the validity of the *Pennell* decision as opposed to *Haley v. Blue Ridge Transfer*. Petitioners' conditional acceptance of *Haley* in the district court was merely an acknowledgement that *Haley* was controlling precedent in the Fourth Circuit. The attack on *Haley* was pressed on appeal to the Fourth Circuit and the court below addressed that issue on its merits. Accordingly, no bar exists to this Court's consideration of petitioners' arguments.

by the trial court and found not to necessitate disturbance of the sentence. Both the guilt and sentencing phases were reviewed fully on direct appeal to the Supreme Court of Virginia and upheld. Indeed, so little significance was attached to the remark that it was scarcely mentioned in the briefs and received no attention from the Supreme Court of Virginia. The case moved through state habeas corpus proceedings and no cause was found for vacating the death sentence. Nonetheless, the federal collateral attack upon the presumptively valid state judgment has resulted in the vacation of the sentence based solely upon a single, off-hand remark made by an undistinguished individual. The district court and the Fourth Circuit determined that they were compelled to grant relief because the remark met the minimum requirement for being "presumptively prejudicial" -- it touched upon the issue then being considered by the jury. The courts below were forced by Rule 606(b) to disregard the conclusive evidence available from the jurors themselves which absolutely denied any prejudicial influence from the comment.

The result in this case is particularly inappropriate because of its posture -- the case is not a direct appeal, or even a state habeas proceeding, but a federal collateral attack of a state criminal judgment. This posture of the case mandates that a prisoner establish actual prejudice in order to obtain habeas corpus relief. *See United States v. Frady*, 456 U.S. 152 (1982). There is no rational reason why the peculiar facts and circumstances of this case should be treated differently.

This case represents a further intrusion into the finality of state judgments by federal reviewing courts. It is repugnant to the notions of finality of judgment and comity. Comity is "a principle controlling all habeas corpus petitions to the federal courts, . . . those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstance of peculiar urgency are shown to exist." *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982) (quoting *Ex Parte Hawk*, 321 U.S. 114, 117 (1944)). The Fourth Circuit's decision in this case carves out an exception to these well-established principles.

CONCLUSION

This Court should accept this case for review in order to eliminate the confusion that has emerged since *Smith v. Phillips*. The petitioners will be asking this Court to confirm the reasonable construction of *Smith v. Phillips* adopted by the Sixth Circuit in *Pennell*, and its progeny.

The Fourth Circuit rule provides a criminal defendant with a weapon

to attack a unanimous state jury verdict in federal court by showing nothing more than an off-hand comment made in the presence of some jurors. It relieves him of any responsibility to establish prejudice and provides the State with no means to defend against the attack.

For the foregoing reasons, and those stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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